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Status: GRANTED

Title: City of Milwaukee, Petitioner
v.
Cement Division, National Gypsum Company, et al.

Docketed:
November 1, 1994

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Langley,Grant Frederick

Counsel for respondent: Stover Jr.,Harney B.

Opinion amended 8-22-94.

Entry	Date	Note	Proceedings and Orders
1	Nov 1 1994	G	Petition for writ of certiorari filed.
2	Dec 1 1994		Brief of respondents Cement Division, National Gypsum Company, et al. in opposition filed.
3	Dec 7 1994		DISTRIBUTED. January 6, 1995 (Page 14)
4	Dec 14 1994	X	Reply brief of petitioner filed.
5	Jan 6 1995		Petition GRANTED.
			**********
6	Feb 2 1995		SET FOR ARGUMENT MONDAY, APRIL 24, 1995. (4TH CASE).
8	Feb 16 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
9	Feb 21 1995		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Wisconsin (7 BOXES).
10	Feb 21 1995		Joint appendix filed.
11	Feb 21 1995		Brief of petitioner City of Milwaukee filed.
12	Feb 24 1995		CIRCULATED.
13	Mar 24 1995	X	Brief of respondents Cement Division National Gypsum Company, et al. filed.
14	Apr 12 1995	X	Reply brief of petitioner filed.
15	Apr 25 1995		ARGUED.

Supreme Court, U.S.
FILED

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No. _ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an admiralty collision case, is a genuine dispute regarding liability in a mutual fault case a peculiar circumstance permitting the district court in its discretion to deny a request for prejudgment interest by a party bearing twice as much fault as the party from whom interest is sought?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Milwaukee and the respondents Cement Division, National Gypsum Company; Reed & Brown, Inc.; New York Marine Managers, Inc.; Allstate Insurance Company, c/o American Marine Underwriters, Inc.; Highlands Insurance Company; Employers Casualty Company of Texas, c/o Texas Marine Underwriters Agency, Inc.; Donald H. Miller, Inc.; U.S. Fidelity and Guarantee Company; Great Lakes Protective Association; The Atlantic Companies; Lloyds Underwriters, Institute Companies, including: Commercial Union Assurance Co. Ltd., "I" A/o. Andrew Weir Insurance Co. Ltd., English & American Insurance Co. Ltd., "M" 1 A/o., Orion Insurance Co. Ltd., "T" A/o. Yasuda Fire & Marine Insurance Co. (U.K.) Ltd., "T" A/o., Atlas Assurance Co. Ltd., "T" A/o., Phoenix Assurance Co. Ltd., British Law Insurance Co. Ltd., Road Transport and General Insurance Co. Ltd., Insurance Company of North America (U.K.) Ltd., "G" A/o., Insurance Company of North America (U.K.) Ltd., "O" A/o., Home Insurance Co. Ltd., "X" A/o., London & Hull Maritime Insurance Co. Ltd., Hanover Insurance Co. Ltd., Sphere Insurance Co. Ltd., Drake Insurance Co. Ltd., Bishopsgate Insurance Co. Ltd., "F" A/o., British Law Insurance Co. Ltd., No. 2 A/o., Minster Insurance Co. Ltd., No. 2 A/o., Insurance Corporation of Ireland, "L" A/o., Folksam International Insurance Co. (U.K.) Ltd., Terra Nova Insurance Co. Ltd. per Andrew Drysdale Ltd., Economic Insurance Co. Ltd., "GENERAL" A/o., c/o Willis, Faber & Dumas Ltd., Ten Trinity Square, London EC3P 3AX England.

Petitioner, City of Milwaukee, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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No. _____

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, City of Milwaukee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on August 5, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 31 F.3d 581 (7th Cir. 1994), and is reprinted in the appendix hereto. [1a]

The decision and order of the United States District Court for the Eastern District of Wisconsin has not been reported. It is reprinted in the appendix hereto. [19a]

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1333, the respondents brought this suit in admiralty in the Eastern District of Wisconsin. The Eastern District bifurcated the trial of liability and damages, and liability was ultimately established as follows: two-thirds against respondents and one-third against petitioner.

After liability was established the parties settled all damages issues except whether respondents are entitled to prejudgment interest on the damages paid by the City. On May 28, 1993, the Eastern District adjudged that the petitioner was not liable to respondents for payment of prejudgment interest and dismissed the action on its merits. [18a]

Respondents appealed the decision of the Eastern District to the Seventh Circuit under 28 U.S.C. § 1291. On August 5, 1994, the Seventh Circuit entered an opinion and judgment reversing the Eastern District's denial of prejudgment interest. [1a]

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(a).

STATEMENT OF THE CASE

On December 24, 1979, the SS EM FORD, a self-unloading bulk cement carrier, loaded with 5,700 tons of bulk cement, was moored in a slip in Milwaukee's outer harbor on southern Lake Michigan. In the course of a severe winter storm, the FORD, over a twelve-hour period, broke loose from its moorings, battered against the headwall of the slip, tore holes in its hull, took on water and sank to the bottom of the slip.

The owners of the vessel, National Gypsum, and its insurers brought this suit in admiralty pursuant to 28 U.S.C. § 1333 against the City seeking $6.5 million in damages. The suit alleged, among other things, that the City had negligently breached its duty as a wharfinger by failing to warn National Gypsum of the danger posed by weather to vessels in the berthing slip. The City denied fault and alleged in its counterclaim that National Gypsum was negligent in leaving the FORD moored in an outer harbor in winter virtually unmanned, and with no means of monitoring weather or summoning tugs or a pilot for assistance. The City sought to recover $250,000 for damages to the dockwall caused by the vessel.

The trial was bifurcated, with the liability portion tried in January, 1986 to the district court without a jury. The district court, in an opinion rendered in June, 1989, found both National Gypsum and the City negligent and contributorily negligent, and found National Gypsum 96 percent at fault and the City 4 percent at fault.

National Gypsum by means of an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3), appealed that portion of the district court's decision apportioning fault

96/4. The Seventh Circuit held that the district court's apportionment of fault was clearly erroneous and reapportioned fault two-thirds upon National Gypsum and one-third upon the City. *Cement Div., Nat. Gypsum Co. v. City of Milwaukee,* 915 F.2d 1154 (7th Cir. 1990), *cert. denied,* 499 U.S. 960 (1991).

Following remand, the parties negotiated a settlement of the damages issue. The parties agreed that the City owed the plaintiffs the amount of $1,677,541.86 in damages, which the City promptly paid in January, 1992. The parties were unable to reach an agreement on the issue of prejudgment interest and submitted the issue to the district court to decide. National Gypsum requested the district court to award $5,317,807.70 in prejudgment interest, which the City opposed. Following briefing on the issue, the district court denied the request for prejudgment interest.

The district court, although recognizing that an award of prejudgment interest is the general rule in admiralty, decided that under the peculiar circumstances of this case, it would be inequitable to require the City to pay prejudgment interest. The district court found that the case involved a genuine dispute over a good faith claim in a mutual fault case, and held that the mutual fault of the parties, including the fact that National Gypsum was two-thirds at fault, rendered any award of prejudgment interest inequitable. The district court also found that the City's status as a municipality undercut one of the reasons for awarding prejudgment interest. Prejudgment interest is awarded generally, the district court noted, because the shipowner has been deprived of money to repair the ship, while the wrongdoer is accruing interest on the money. In this case, however, the City

had not accrued interest on the amount owed and, accordingly, should not be treated as if it had. [19a] National Gypsum appealed.

In deciding the appeal, the Seventh Circuit examined the Ninth Circuit's decision in *Alkmeon Naviera, S.A. v. M/V Marina L.*, 633 F.2d 789 (9th Cir. 1980). The Ninth Circuit in *Alkmeon Naviera* held that in light of the comparative fault rule announced by this Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), mutual fault can no longer constitute a reason to deny an otherwise appropriate award of prejudgment interest. The Ninth Circuit reasoned that prior to this Court's ruling in *Reliable Transfer*, collision cases were decided in accordance with the equal division of damages rule. Under that rule, where both parties were found to be at fault for a collision, the parties' damages would be added together and the total would be divided between them. The party whose damages were lesser would pay to the other party one-half of the difference between their respective losses. The less culpable party would be required to pay one-half of the other party's damages. To award prejudgment interest to the more culpable party would penalize the less culpable party who, having paid one-half of the other party's damages, would have to pay interest on that amount as well. This potential for distortion of compensation led some courts to deny requests for prejudgment interest where the party seeking it was substantially more at fault. The Ninth Circuit reasoned that because this Court in *Reliable Transfer* replaced the equal division of damages rule with the comparative fault rule "distortions in compensation can no longer occur." *Alkmeon Naviera*,

633 F.2d at 798 n.12. Accordingly, the reason for denying prejudgment interest no longer exists. [7a-9a]

The Seventh Circuit rejected what it characterized as the balancing of the equities approach used by the Fifth Circuit in *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983). In rejecting the Fifth Circuit's approach, the Seventh Circuit relied upon this Court's decision in *West Virginia v. United States*, 479 U.S. 305 (1987), which held that parties owing a debt to the federal government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money. [9a-10a]

The Seventh Circuit also rejected the rationale of the Fifth Circuit stated in *Sinclair Refining Co. v. S.S. Green Island*, 426 F.2d 260, 262 (5th Cir. 1970), that uncertainty concerning ultimate liability which characterizes mutual fault cases mitigates against awarding prejudgment interest. The Seventh Circuit reasoned that the uncertainty concerning ultimate liability which existed under the equal division of damages rule does not exist under the comparative fault rule. [11a-12a]

Finally, the Seventh Circuit held that the City's status as a municipality does not constitute a peculiar circumstance warranting denial of prejudgment interest. The court found no precedent for the district court's decision, although the issue had not been raised in previous cases. [13a]

The Seventh Circuit adopted the rationale of the Ninth Circuit in *Alkmeon Naviera* and held that mutual fault of the parties in an admiralty collision case does not constitute a peculiar circumstance justifying denial of

prejudgment interest. Accordingly, the Seventh Circuit held that the district court's holding that a genuine dispute in a mutual fault case is a peculiar circumstance justifying the denial of prejudgment interest was clearly erroneous, reversed the judgment of the district court, and remanded for the calculation of prejudgment interest. [13a, 15a]

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's Decision, Although Consistent with the Decisions of the Ninth and Sixth Circuits, Directly Conflicts with Decisions of the Fifth and Eleventh Circuits.

The Seventh Circuit, in deciding that mutual fault of the parties in an admiralty collision case is not a peculiar circumstance justifying denial of prejudgment interest, followed the decision of the Ninth Circuit in *Alkmeon Naviera, S.A. v. M/V Marina L.*, 633 F.2d 789 (9th Cir. 1980), and of the Sixth Circuit in *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990). The decision of the Seventh Circuit in this case and the decisions of the Ninth Circuit in *Alkmeon Naviera* and the Sixth Circuit in *Anderson* directly conflict with decisions of the Fifth and Eleventh Circuits. In addition, the decision of the Seventh Circuit that the degree of fault of the party seeking interest is irrelevant, conflicts with the decision of the Fifth Circuit on this point.

A. Mutual Fault

In *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983), the Fifth Circuit affirmed the district court's denial of plaintiff-tow's request for prejudgment interest where the court found the plaintiff-tow 25 percent at fault for the collision and the defendant-tow 75 percent. The Fifth Circuit held that "the existence of a genuine dispute regarding ultimate liability or the complexity of the factual and legal issues to be resolved" constitutes a "peculiar circumstance, justifying denial of prejudgment interest." *Id.* at 328. The Fifth Circuit rejected plaintiff's argument that because a "serious dispute" always exists at trial, it should not be a basis for denying prejudgment interest. The court stated as follows:

> Yet a finding that a plaintiff was partially at fault weakens his equitable claim that his funds have been withheld by a recalcitrant party. Not surprisingly then, our cases have consistently upheld denials of prejudgment interest in cases of apportioned fault.

Id. at 328.

The Seventh Circuit held, contrary to the foregoing, that mutual fault is no longer a valid reason for denying prejudgment interest because comparative fault principles now apply in all admiralty collision cases, citing *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). The Seventh Circuit reasoned that the rationale which compelled the Court to abrogate the equal division of damages rule in *Reliable Transfer* supports the conclusion that neither mutual fault nor the degree of fault of the party seeking interest is germane to the question of whether prejudgment interest should be awarded.

Reliable Transfer did hold that comparative fault principles were to apply in all admiralty collision cases, but did not discuss, much less address, the question of whether mutual fault justifies denial of prejudgment interest because that question was not before the Court. Several circuits have addressed the question in the context of a request for prejudgment interest of a party who had been found to be contributorily negligent. No circuit has previously addressed the question in the context of a request of a party who had been found to be *primarily* responsible for the casualty, as is the case with the insured shipowner here.

In support of its position, the Seventh Circuit cites *Alkmeon Naviera* and *Anderson*. Both cases utilize an analysis that has been rejected as flawed by the Fifth and Eleventh Circuits. In *Alkmeon Naviera,* the Ninth Circuit held that there were no "peculiar circumstances" justifying denial of prejudgment interest notwithstanding a finding that the plaintiff was 40 percent at fault. The rationale for the court's decision was that the abrogation of the equal division of damages rule in *Reliable Transfer* made it no longer necessary to deny prejudgment interest on mutual fault grounds because the distortion in compensation, which would occur by awarding prejudgment interest against parties who were slightly negligent, would no longer occur. *Alkmeon Naviera,* 633 F.2d at 798 n.12.

In *Anderson,* the Sixth Circuit followed *Alkmeon Naviera* in holding that mutual fault alone should not justify the denial of prejudgment interest in a wrongful death case brought under maritime law. The decision was

made in an action brought against the boat manufacturers, boat owners, and others by the families and representatives of boaters who had drowned. Plaintiffs' decedents were found to be 20 percent at fault.

The Fifth Circuit has not only declined to reconsider the rule governing the award of prejudgment interest in mutual fault cases, but has specifically rejected the rationale relied upon by the Ninth and Sixth Circuits. *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 329. Commenting on the rationale in *Alkmeon Naviera*, the Fifth Circuit noted that prior to the decision in *Reliable Transfer*, courts made no distinction between denying prejudgment interest in collision cases and denying it in personal injury cases, although personal injury cases were not subject to the equal division of damages rule abrogated in *Reliable Transfer*, but instead were subject to the same comparative negligence rule that the court held was to apply in collision cases. *Id.* The court stated:

> The flaw in this analysis is that comparative fault has long been the rule in maritime personal injury actions. *See United States v. Reliable Transfer Co.*, 421 U.S. at 408 at n. 13, 95 S.Ct. at 1714 n. 13. Yet courts drew no distinction between denials of prejudgment interest in collision cases and such denials in personal injury cases. The Ninth Circuit's intimation that denials of prejudgment interest were somehow tied up with the rule of divided damages is not persuasive. We conclude that *Reliable Transfer* does not require reexamination of the law regarding denials of prejudgment interest.

Inland Oil and Transport Co., 696 F.2d at 329.

The Eleventh Circuit has followed the Fifth Circuit and has held that the existence of a genuine dispute regarding liability is one "peculiar circumstance" which may warrant denial of prejudgment interest, and that "the existence of such a peculiar circumstance is generally assumed in cases of apportioned fault." *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986).

B. Degree of Fault

The Seventh Circuit rejected the idea that awarding prejudgment interest to a party two-thirds at fault for the collision might be inequitable. In contrast, the Fifth Circuit has consistently held that a high degree of contributory negligence constitutes a peculiar circumstance that would make it inequitable to award prejudgment interest.

In *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982), the Fifth Circuit vacated a judgment rendered in favor of a deck hand which had been reduced 75 percent due to the deck hand's contributory negligence. The district court had denied prejudgment interest because of the degree of contributory negligence found on the part of the deck hand. The Fifth Circuit reversed the finding of 75 percent contributory negligence against the deck hand because the district court had considered a factor in the case that reflected an impermissible expansion of the limited duties placed upon seamen in the safe performance of their duties. *Id.* at 1194. Because the Fifth Circuit reversed the district court's finding on the

underlying issue of the degree of contributory negligence, it also reversed and remanded the derivative finding denying prejudgment interest. *Id.* at 1196. Having remanded the case for a new finding concerning contributory negligence and prejudgment interest, the court stated:

> On remand, the issue for the trial court is whether the degree of contributory negligence it finds gives rise to a "peculiar circumstance" that would make it inequitable to apply the usual rule granting prejudgment interest. In the proper case, a high degree of contributory negligence might well be considered by the district court in invoking its discretion to deny prejudgment interest.

Id. at 1197.

In *Inland Oil and Transport Co.*, the Fifth Circuit relied in part upon this statement in upholding a denial of prejudgment interest claimed by a party who had been found 25 percent at fault. 696 F.2d at 328. The Fifth Circuit also noted with approval two of its previous cases where it had affirmed the denial of prejudgment interest because of the degree of contributory negligence by the party seeking the interest award: *Nat G. Harrison Overseas Corp. v. American Tug Titan,* 516 F.2d 89 (5th Cir. 1975) [affirming the denial of prejudgment interest to a bargeowner whose claim against a stevedoring operation had been reduced 50 percent because of the barge's unseaworthiness.]; and *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982) [upholding denial of prejudgment interest in a personal injury suit brought by a

longshoreman who had been found 40 percent contributorily negligent.] *Id.*

The Fifth Circuit recently reaffirmed its reasoning in *Inland Oil* in *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068 (5th Cir. 1992), *rev'd on other grounds*, 511 U.S. ___, 114 S.Ct. 1461 (1994). There the Fifth Circuit upheld a denial of prejudgment interest to the purchaser of a crane which was damaged along with the offshore platform deck it was lifting when the crane hook and sling broke. Fault was allocated 32 percent to the crane manufacturer, 38 percent to the hook manufacturer, and 30 percent to the purchaser and sling defendants with which the purchaser had settled. The court based its conclusion upon the existence of a genuine dispute over good faith claims in a mutual fault setting. The court stated:

> "Our cases have consistently upheld denials of prejudgment interest in cases of apportioned fault."

Id. at 1081 (quoting *Inland Oil and Transport Co.*, 696 F.2d at 328). The court also approved a jury instruction which charged:

> The circumstances which may justify denial of an award for pre-judgment interest are as follows: A genuine dispute over a good faith claim exists in a mutual fault situation – mutual fault setting; the damages awarded are substantially less than the amount claimed by the Plaintiff; *the Plaintiff's contributory negligence is to such a magnitude as to make and [sic] award of pre-judgment interest inequitable.* (emphasis added)

McDermott, Inc., 979 F.2d 1068 at 1081 n.17.

CONCLUSION

For over a century, this Court has held that an award of prejudgment interest in admiralty "rested in the discretion of the court below." *The Maggie J. Smith*, 123 U.S. 349, 356 (1887). In *The Maggie J. Smith*, this Court held that denying prejudgment interest to a party found not to be at fault for a collision is a proper exercise of the district court's discretion. This Court's decision in *Reliable Transfer* did not discuss, much less address, the question of whether the century old rule governing the awarding of prejudgment interest should be changed.

The decisions of the Seventh, Ninth and Sixth Circuits have replaced the discretion of the district court to equitably decide applications for prejudgment interest in mutual fault admiralty cases with a mechanical rule requiring the awarding of prejudgment interest irrespective of the degree of fault of the party seeking interest. The error in their reasoning is their conclusion that under the comparative fault rule "distortions in compensation can no longer occur." *Alkmeon Naviera*, 633 F.2d at 798 n.12. The fallacy of this conclusion is illustrated by this case.

The parties in this case agreed that National Gypsum's damages, less the offset for the City's damages, were $5,032,625. Under the equal division of damages rule, the City would have been required to pay one-half of the damages amount to National Gypsum, or $2,516,312, but the City would not have been obligated to pay prejudgment interest because it was the party lesser at fault. Under the equal division of damages rule, therefore, the City would have been required to pay $838,771

more in damages than it would have been required to pay under the comparative fault rule, excluding interest. Under the comparative fault rule and the interest rule in *Alkmeon Naviera,* the City is required to pay one-third of the stipulated damages amount, $1,677,541, plus prejudgment interest. In this case, National Gypsum claims $5,317,807 in prejudgment interest, which would require the City to pay a total of $6,995,348, which is $1,962,723 more than the total stipulated damages amount, and $4,479,036 more than it would have paid under the equal division of damages rule. It is therefore obvious that each rule results in distortion in compensation; however, the rule in *Alkmeon Naviera* can result, as in this case, in greater distortion in compensation in favor of the party who has the greater degree of fault than the equal division of damages rule.

It is no answer to say that the City enjoyed the benefit of holding on to the money while this case was pending, because the City, in fact, did not hold on to any money, and the fact that the litigation was lengthy was not the fault of the City. Some distortion in compensation will occur under either rule; however, whatever distortion occurs should be in favor of the party least responsible for the collision, and not in favor of the party primarily responsible for the collision. To impose upon a party one-third at fault damages in excess of the total damages incurred by the party two-thirds at fault is not only inequitable and unjust, but unconscionable.

The conflict between the Fifth and Eleventh Circuits, on the one hand, and the Seventh, Ninth and Sixth Circuits, on the other hand, will not resolve itself because

both sides have already considered and rejected the reasoning of the other side. The question can only be resolved by this Court and this Court should resolve it in this case so that the distortion in compensation which has occurred in this case is corrected and will not occur in the future.

For these reasons, the petitioner respectfully requests the Court to grant the petition.

Respectfully submitted,

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October 31, 1994

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2545

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al.,

Plaintiffs-Appellants,

v.

CITY OF MILWAUKEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 80 C 1001 – **Thomas J. Curran,** *Judge.*

ARGUED FEBRUARY 25, 1994 – DECIDED AUGUST 5, 1994

Before CUMMINGS AND MANION, *Circuit Judges,* and MILLER, JR., *District Judge.**

MANION, *Circuit Judge.* While moored at a berth in the Port of Milwaukee, a ship broke away, crashed into a headwall and sank. The ship's owners and insurers sued the city. The first appeal to this court resulted in a division of liability, two-thirds to the ship's owners and one-

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*Hon. Robert L. Miller, Jr., District Judge for the Northern District of Indiana, is sitting by designation.

third to the city. On remand, the district court determined that because the parties were mutually at fault, and because the defendant was a municipality, the defendant would not be liable for prejudgment interest on its share of the amount of damages incurred. We reverse the district court and remand for the calculation of prejudgment interest.

I.

This appeal is the latest chapter in a 15-year-old dispute arising out of an accident involving a ship called the S/S EM FORD ("FORD"). The facts surrounding the damage to the FORD and its cargo have been set out in copious detail in our previous disposition of this matter in *Cement Div., Nat. Gypsum Co. v. City of Milwaukee*, 915 F.2d 1154 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1583 (1991). For purposes of the present appeal, we offer only the following. The FORD was moored at a berth at the Port of Milwaukee, Wisconsin. During a storm, the FORD broke away, crashed into the headwall of its berth and sank to the bottom of the Milwaukee Harbor. Following this, the FORD's owner, the Cement Division of the National Gypsum Company, along with the ship's various insurers (referred to collectively as "National Gypsum"), commenced an admiralty action against the City of Milwaukee ("City"), claiming $4.5 million in damages to the FORD and her cargo. The City denied liability, alleged contributory negligence on the part of National Gypsum and sought $250,000 from National Gypsum for damage to the City's dockwall caused by the FORD.

At a bifurcated trial on the issue of liability, the district court found National Gypsum to be 96% negligent and the City 4% negligent. Following an interlocutory appeal, we reversed the district court's allocation of liability, and reapportioned the parties' liability, two-thirds to National Gypsum, one-third to the City. *See Nat. Gypsum Co.*, 915 F.2d at 1160.

Following remand, the parties negotiated the issue of damages. Pursuant to a settlement agreement, a judgment was entered against the City in the amount of $1,788,541.86, which the City promptly paid over to the court. Hence, the only issue left for the district court to determine was whether National Gypsum was entitled to collect prejudgment interest – to the tune of $5,317,807.70 – on the damages paid by the City. Following briefing on the issue, the district court denied National Gypsum's request for prejudgment interest. Although recognizing that an award of prejudgment interest is the general rule in admiralty, the district court determined that under the peculiar circumstances of this case it would be inequitable to require the City to pay prejudgment interest. Specifically, the district court determined that the mutual fault of the parties, including the fact that National Gypsum was two-thirds contributorily negligent, rendered any award of prejudgment interest inequitable.

Alternatively, the district court found that the City's status as a municipality undercut one of the reasons for awarding prejudgment interest. The district court noted that an admiralty plaintiff is awarded prejudgment interest because from the date of the loss, the plaintiff-shipowner has been deprived of the money to repair his ship while, at the same time, the wrongdoer has enjoyed the

use of the victim's money and is accruing interest on it. The district court observed that a municipality, "is not in [a] position. . . . to set aside an interest bearing fund at the time of loss, but can only levy taxes to pay a settlement or final judgment." *Decision and Order* at 5. The district court apparently reasoned that since the City had not been accruing interest on the amount owed to National Gypsum from the date of the accident, it should not be treated as if it had. This unique circumstance, the district court determined, constituted another reason why an award of interest would be inappropriate. This appeal followed.

II.

The issue before us is whether the district court erred in denying National Gypsum's request for prejudgment interest. "The general rule in admiralty, in order to fully compensate the plaintiff, is to award prejudgment interest from the date of the accident." *Central Rivers Towing v. City of Beardstown*, 750 F.2d 565, 574 (7th Cir. 1984); *accord United States v. Peavey Barge Line*, 748 F.2d 395, 401, 402 (7th Cir. 1984); *Bunge Corp. v. American Comm. Barge Line Co.*, 630 F.2d 1236, 1242 (7th Cir. 1980); *First Nat. Bank of Chicago v. Material Serv. Corp.*, 597 F.2d 1110, 1120 (7th Cir. 1979). This general rule notwithstanding, admiralty law also recognizes that a district court has discretion to deny prejudgment interest where it finds that special or peculiar circumstances would render such an award inequitable. *See Central Rivers Towing*, 750 F.2d at 574; *accord Hillier v. Southern Towing Co.*, 740 F.2d 583, 585 (7th Cir. 1984). Examples of such peculiar circumstances include: (1) the unreasonable delay in filing the action by the

party seeking prejudgment interest; (2) false or frivolous claims; (3) the inability to determine liability and the extent of damages eligible for an award of prejudgment interest; and (4) the mutual fault of the parties. *See Central Rivers Towing*, 750 F.2d at 574. The existence of a peculiar circumstance is a factual determination which we will review for clear error. *Hillier*, 740 F.2d at 585. If the determination is not clearly erroneous, then the decision to deny prejudgment interest based on the existence of those peculiar circumstances is left to the district court's discretion. *Id.* But this discretion "is not unbridled; it is exercised by law." *In Re Oil Spill By The Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992); *see also Afran Transport Co. v. The Bergechief*, 285 F.2d 119, 120 (2d Cir. 1960) (stating that a district court's discretion to deny prejudgment interest is "a legal discretion, rather than merely one at will."); *The Wright*, 109 F.2d 699, 702 (2d Cir. 1940) (same). In other words, "[d]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Amoco Cadiz*, 954 F.2d at 1334 (quotations omitted) (citations omitted). As a result, while prejudgment interest in admiralty is within the district court's discretion, "this discretion must be 'exercised with a view to the right to interest unless the circumstances are exceptional.' " *Alkmeon Naviera, S.A. v. M/V MARINA L.*, 633 F.2d 789, 797 (9th Cir. 1908) (quoting *The President Madison*, 91 F.2d 835, 847 (9th Cir. 1937)).

National Gypsum raises two challenges to the district court's refusal to award prejudgment interest. First, it contends that the district court incorrectly denied prejudgment interest on the basis of mutual fault. National

Gypsum does not claim that the district court's finding of mutual fault was clearly erroneous; rather, it maintains that, as a matter of law, mutual fault can no longer constitute a peculiar circumstance justifying the denial of interest. Second, National Gypsum challenges the district court's determination that the City's status as a municipality shields it from having to pay prejudgment interest. We will address each of these contentions in turn.

A. Mutual Fault

National Gypsum argues that the mutual fault of the parties cannot constitute a special or peculiar circumstance justifying the denial of prejudgment interest. While acknowledging at oral argument that this court, in *Central Rivers Towing, Hillier* and *First Nat. Bank of Chicago,* listed mutual fault as a peculiar circumstance, it also correctly pointed out we have never actually relied on this in affirming a district court's denial of prejudgment interest. Accordingly, National Gypsum asks us to consider whether mutual fault should be recognized in this circuit as a valid basis to deny an award of prejudgment interest. In support of its position, National Gypsum urges us to adopt the reasoning of the Ninth Circuit in *Alkmeon Naviera,* which has stated that, in light of the proportionate fault rule announced by the Supreme Court in *United States v. Reliable Transfer,* 421 U.S. 397 (1974), mutual fault can no longer constitute a reason to deny an otherwise appropriate award of prejudgment interest. Therefore, in determining the merits of National Gypsum's arguments, we must first examine the Ninth Circuit's decision in *Alkmeon Naviera.*

Alkmeon Naviera involved a collision between two vessels which were both at fault. In ruling on the parties' requests for prejudgment interest, the district court summarily denied the requests, stating without elaboration that the peculiar circumstances of the case did not entitle either party to an award of interest. On appeal, the Ninth Circuit found no basis in the record before it that would justify the district court's determination and, accordingly, reversed and remanded for a determination of existence of special or [sic] circumstances that would warrant the denial of prejudgment interest. *See Alkmeon Naviera,* 633 F.2d at 798.

The portion of *Alkmeon Naviera* relevant to the case before us is where the court discusses the reasons behind the mutual fault exception. The court observed that district courts "denied prejudgment interest in mutual fault cases in order to mitigate the harsh effects of the old equal division of damages rule." *Alkmeon Naviera,* 633 F.2d at 798 n.12. Under that rule, whenever there was a collision resulting from the fault of both parties, then the parties' damages would be added together and the total would be equally divided between them. Under that formula, if one party's damages were greater than the other's, then the court would order the party with the lesser damages to pay over to the other party one-half of the difference between their respective losses, the rationale being that this would equalize the burden. *See The Manitoba,* 122 U.S. 97, 111 (1887); *accord The North Star,* 106 U.S. 17, 22 (1882). Under this regime, however, courts soon recognized that in cases where one party was only slightly negligent, an award of prejudgment interest to the more culpable party would, in effect, penalize the less

culpable party. This is because that party, having already been saddled with paying one-half of the other party's damages, would now have to pay prejudgment interest on that amount as well, even though he was significantly less responsible for the damages incurred. This led some courts in divided damages cases either to award prejudgment interest to the party who was only slightly at fault, or to deny prejudgment interest in cases where the party seeking it was substantially more at fault. *See Alkmeon Naviera*, 633 F.2d at 798 n.12; *see also Iberian Tankers Co. v. Gates Constr. Corp.*, 504 F.2d 747, 748 (2d Cir. 1974) (stating that in a collision case involving mutual fault "the district court has discretion to deny [prejudgment] interest where the party to whom it would be awarded is substantially at fault."); *Afran Transport Co.*, 285 F.2d at 120 (suggesting that an award of prejudgment interest to the less culpable party in a case involving mutual fault would be appropriate to "ameliorate somewhat the harsh American rule that division of damages must be equal without reference to the degree of fault.").

But as stated earlier, the divided damages rule was thrown overboard by a unanimous Court in *United States v. Reliable Transfer* and was replaced with comparative fault. That being the case, the court in *Alkmeon Naviera* reasoned that "distortions in compensation can no longer occur." *Alkmeon Naviera*, 633 F.2d at 798 n.12. In other words, because *Reliable Transfer* extinguished the divided damages rule and thus its harsh effects, there no longer exists a reason to deny prejudgment interest in collisions cases involving mutual fault. In fact, if comparative fault "penalizes wrongdoing [] in proportion to measure of

fault," *Reliable Transfer*, 421 U.S. at 405 n.11, then, according to *Alkmeon Naviera*, to continue denying prejudgment interest on the basis of mutual fault would, in essence, be penalizing the more culpable party twice for the same mistake. *See Alkmeon Naviera*, 633 F.2d at 798 n.12 (citing *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854, 876 (E.D. Pa. 1977)). For these reasons, the court in *Alkmeon Naviera* concluded that it no longer made sense to invoke the mutual fault of the parties as a basis to deny prejudgment interest. More recently, the Sixth Circuit in *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), took note of and agreed with *Alkmeon Naviera*'s reasoning in holding that it would no longer consider mutual fault to be a peculiar circumstance justifying the denial of prejudgment interest. *Anderson*, 894 F.2d at 810. We, too, are persuaded by the reasoning in *Alkmeon Naviera* and likewise conclude that, as a matter of law, the mutual fault of the parties should not constitute a reason to deny an award of prejudgment interest in admiralty.

The City raises several reasons to follow the mutual fault exception, none of which merits extended discussion. First, the City appears to argue that the rationale for mutual fault has nothing to do with offsetting the divided damages rule. Instead, the City, relying on *Inland Oil and Transport Co. v. Ark-White Towing*, 696 F.2d 321 (5th Cir. 1983), argues that where the party making a claim to interest is partially at fault, this "weakens his equitable claim that his funds have been withheld by a recalcitrant party." *Inland Oil*, 696 F.2d at 328. The City's contention that the language from *Inland Oil* best provides a basis for denying prejudgment interest in cases involving mutual fault would require a balancing of the equities approach,

an approach we believe cannot be sustained following the Supreme Court's decision in *West Virginia v. United States*, 479 U.S. 305 (1987). There, the United States sought recovery of prejudgment interest on a debt incurred by the state of West Virginia for emergency relief provided by the Army Corps of Engineers. The district court in that case held that the question of whether interest had to be paid depended on a balancing of equities between the parties. The Supreme Court's assessment of this method for refusing to award prejudgment interest was simple: "[T]he Court of Appeals rejected such an approach, *as do we.*" *West Virginia*, 479 U.S. at 311 n.3 (emphasis added); *accord Amoco Cadiz*, 954 F.2d at 1334-35.[1]

Second, the City contends that where there is mutual fault, the exact amount of the funds due and owing from each party to the other is not immediately ascertainable and fixed before trial. Because of this uncertainty, the City argues, it is inequitable to charge a party interest for

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[1] We note that the court in *Inland Oil* heard arguments urging that it adopt the reasoning in *Alkmeon Naviera* and abolish the mutual fault exception. The Fifth Circuit, however, rejected this invitation, claiming that the reasoning in *Alkmeon Naviera* was flawed. This was because, according to *Inland Oil*, "comparative fault has long been the rule in maritime personal injury actions. Yet courts drew no distinction between denials of prejudgment interest in collision cases and such denials in personal injury cases." *Id.* (citation omitted). We point out, however, that, except for citing *Reliable Transfer* for the proposition that interest has long been allowed in personal injury cases in admiralty, the court in *Inland Oil* cited no other authority for its statements that admiralty decisions made no distinction between personal injury and collision cases. Therefore, we do not accept *Inland Oil*'s reasons for rejecting *Alkmeon Naviera* in reaching today's conclusion.

not paying an unknown sum. We agree that there are decisions stating that, at least where fault is mutual, prejudgment interest from the date of the collision should be denied due to the uncertainty as to which party will bear the ultimate liability to make payment to the other. *See, e.g., First Nat. Bank of Chicago,* 597 F.2d at 1121 (adopting the rationale of the Fifth Circuit in *Sinclair Refining Co. v. S.S. Green Island,* 426 F.2d 260, 262 (5th Cir. 1970), and stating that in cases involving mutual fault, the uncertainty respecting the party having the ultimate liability should be considered in deciding whether to award prejudgment interest); *The Wright,* 109 F.2d at 702 ("Several cases deny the award of interest . . . where damages are divided as a result of joint fault. This is based on the uncertainty as to the party which will have the ultimate liability to make payment on determination of the balance due."). Of course, using uncertainty as a basis to deny interest in a mutual fault case made sense under the old divided damages regime. This is because under that rule, it was not until after trial that there would be a determination from the district court as to which of the parties would have to come up with the extra money to make the other party whole. But now with the abolition of the divided damages rule and the adoption of comparative fault both parties are liable to each other in relation to their respective degree of fault. In other words, although the exact amount of damages may not be known until after trial, neither party can now claim pretrial uncertainty as to whether he will in fact be liable to the other. Thus, after *Reliable Transfer,* it only makes sense that uncertainty as to eventual liability can no longer be a

factor to consider in determining whether to deny prejudgment interest in cases involving mutual fault.

Lastly, the City contends that this court, on two occasions, in *Central Rivers Towing* and *Hillier,* has had the opportunity to adopt the reasoning of *Alkmeon Naviera* and scuttle mutual fault but has refused to do so. We think the reason for this is clear: the issue of mutual fault was not presented in either case. *Central Rivers Towing,* for example, did not involve a plaintiff who was contributorily negligent; *Hillier* only addressed whether the plaintiff (who was not negligent) could recover prejudgment interest on an award of damages arising out of future losses for pain and suffering. Hence any mention of mutual fault in either of these cases was mere *dicta.* In fact the only decision from this circuit that comes close to applying the mutual fault exception is *First Nat. Bank of Chicago.* In that case, we reversed the district court's initial determination that the plaintiff was not contributorily negligent, and directed the court on remand to reallocate fault between the parties. We also directed the court on remand to determine whether, given the mutual fault of the parties, an award of prejudgment interest to the plaintiff would be inappropriate. *See First Nat. Bank of Chicago,* 597 F.2d at 1121. However, unlike decisions from the Fifth Circuit, which consistently uphold denials of prejudgment interest in mutual fault cases, *see, e.g., Inland Oil,* 696 at 328 (summarizing cases), this court in *First Nat. Bank of Chicago* did not adopt a *per se* rule against prejudgment interest in a case involving mutual fault; rather, the case merely noted that mutual fault was one "factor[] to be considered by the trier of fact *along with other facts and circumstances* in determining if there exist

the necessary peculiar circumstances that will authorize the exercise of discretion to award less than full compensation by denying interest.' " *First Nat. Bank of Chicago,* 597 F.2d at 1121 (quotations omitted) (citations omitted) (emphasis added). Nevertheless, in order to remove any uncertainty, we depart from this portion of *First Nat. Bank of Chicago* and reiterate our holding that the mutual fault of the parties in an admiralty collision case does not constitute a peculiar circumstance justifying the denial of prejudgment interest.**

B. Municipality Status

This justification for denying prejudgment interest need not detain us very long. We have found no cases, nor has the City cited us any, from this circuit or elsewhere which have stated that an award of interest should be denied where the party against whom it is sought is a municipality. In fact, in *Central Rivers Towing,* the plaintiff sought and obtained an award of prejudgment interest at the rate of 12% per annum against the city of Beardstown without the district court or this court ever raising an objection to such an award on the basis that it was being levied against a city. The City has not suggested that we disavow this portion of *Central Rivers Towing.* Accordingly, we refuse to recognize municipality status as a peculiar circumstance warranting the denial of prejudgment interest.

**This opinion was circulated before release to all judges in active service. *See* Circuit Rule 40(f). No judge favored a hearing *en banc.*

C. Calculating the Award

Having determined that National Gypsum is entitled to an award of prejudgment interest, we offer the following to the district court on remand as guidance in calculating that award. First, in keeping with the general rule, the district court should calculate the interest from the date of the accident, *see Central Rivers Towing*, 750 F.2d at 574, which in this case was 1978. As far as the rate at which interest should be calculated, we recognize that such a determination is traditionally left to the district court's discretion. *Id.* But we have said on previous occasions that the best starting point is to award interest at the market rate, which means an average of the prime rate for the years in question. *See Amoco Cadiz*, 954 F.2d at 1332; *accord Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436-37 (7th Cir. 1988); *Central Rivers Towing*, 750 F.2d at 574. In addition, the district court may also want to consider the City's status as a municipality, not as basis to deny prejudgment interest altogether, but as a guide to setting the interest rate. As pointed out by *Amoco Cadiz* and *Gorenstein*, one of the factors used in determining the rate of prejudgment interest is the creditworthiness of the judgment debtor. Thus, the district court could, in its discretion, set the rate of interest to match that which lenders would charge the City for short-term, unsecured loans. *See Amoco Cadiz*, 954 F.2d at 1332; *Gorenstein*, 878 F.2d at 436. As to whether to award compound interest, we conclude that that, too, is a determination better left to the discretion of the district court. *See Transorient Navigators Co., S.A. v. M/S Southwind*, 788 F.2d 288, 293 (5th Cir. 1986). Finally, in calculating its eventual award, we ask the district court to

memorialize its reasoning in order to assist us in the event of future review.

III.

The district court's order denying prejudgment interest is REVERSED. This case is REMANDED to the district court for a determination of prejudgment interest consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 22, 1994

Before

Hon. Walter J. Cummings, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Robert L. Miller, Jr., *District Judge**

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, REED & BROWN, INCORPORATED, NEW YORK MARINE MANAGERS, INCORPORATED, et al. *Plaintiffs-Appellants,*	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 93-2545 v. CITY OF MILWAUKEE, *Defendants-Appellee.*	No. 80 C 1001 **Thomas J. Curran,** *Judge.*

AMENDING ORDER

The court's opinion, issued August 5, 1994, is amended as follows:

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* Hon. Robert L. Miller, Jr., of the Northern District of Indiana, is sitting by designation.

Page 3, lines 1-2: changed to read " . . . in the amount of $1,677,541.86, which the City promptly paid over to the plaintiffs."

Page 12, line 5: change date to read "1979."

UNITED STATES DISTRICT COURT

EASTERN District of WISCONSIN

CEMENT DIVISION, ETAL	JUDGMENT IN A CIVIL CASE
v.	
CITY OF MILWAUKEE,	CASE NUMBER: 80-C-1001
v.	
EDWARD E. GILLEN CO., ET AL	(Filed May 2, 1993)

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. The action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendant City of Milwaukee is not liable to the Plaintiffs for payment of prejudgment interest on the amount paid in settlement.

IT IS FURTHER ORDERED AND ADJUDGED that this action is dismissed upon its merits.

SOFRON B. NEDILSKY
Clerk

May 28, 1993
Date

/s/ C. Brock
(By) Deputy Clerk

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL GYPSUM COMPANY; REED & BROWN, INC.; NEW YORK MARINE MANAGERS, INC.; ALLSTATE INSURANCE COMPANY, c/o American Marine Underwriters, Inc.; HIGHLANDS INSURANCE COMPANY; EMPLOYERS CASUALTY COMPANY OF TEXAS, c/o Texas Marine Underwriters Agency, Inc.; DONALD H. MILLER, INC.; U.S. FIDELITY AND GUARANTEE COMPANY; GREAT LAKES PROTECTIVE ASSOCIATION; THE ATLANTIC COMPANIES; LLOYDS UNDERWRITERS, INSTITUTE COMPANIES, including: COMMERCIAL UNION ASSURANCE CO. LTD., "I" A/o. ANDREW WEIR INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., "M" 1 A/o., ORION INSURANCE CO. LTD., "T" A/o. YASUDA FIRE & MARINE INSURANCE CO. (U.K.) LTD., "T" A/o., ATLAS ASSURANCE CO. LTD., "T" A/o., PHOENIX ASSURANCE CO. LTD., BRITISH LAW INSURANCE CO. LTD., ROAD TRANSPORT AND GENERAL INSURANCE CO. LTD., INSURANCE COMPANY OF NORTH AMERICA (U.K.) LTD., "G" A/o., INSURANCE COMPANY OF NORTH AMERICA (U.K.) LTD., "O" A/o., HOME INSURANCE CO. LTD., "X" A/o., LONDON & HULL MARITIME INSURANCE CO. LTD., HANOVER INSURANCE CO. LTD., SPHERE INSURANCE CO. LTD., DRAKE INSURANCE CO. LTD., BISHOPSGATE INSURANCE CO. LTD., "F" A/o., BRITISH LAW INSURANCE CO. LTD., No. 2 A/o., MINSTER INSURANCE CO. LTD., No. 2 A/o., INSURANCE CORPORATION OF IRELAND, "L" A/o., FOLKSAM INTERNATIONAL INSURANCE CO. (U.K.) LTD., TERRA NOVA INSURANCE CO. LTD. per ANDREW DRYSDALE LTD., ECONOMIC INSURANCE CO. LTD.,

"GENERAL" A/o., c/o Willis, Faber & Dumas Ltd., Ten Trinity Square, London EC3P 3AX England,

Plaintiff,

v.

CITY OF MILWAUKEE,

Defendant and Third-Party Plaintiff,

v.

EDWARD E. GILLEN COMPANY, a corporation, and GREAT LAKES TOWING COMPANY, a corporation,

Third-Party Defendants.

Case No. 80-C-1001

(Filed May 28, 1993)

DECISION AND ORDER

This admiralty case is before this court after remand from the Seventh Circuit. *See Cement Division, National Gypsum Company v. City of Milwaukee*, 915 F.2d 1154 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1583 (1991). On appeal, the Seventh Circuit found that the Plaintiffs were two-thirds negligent in causing damage to the SS EM FORD when that ship was involved in an allision with a berth in the Milwaukee Harbor. The Defendant City of Milwaukee was held to be one-third causally negligent. *See Id.* at 1160.

After liability was established, the parties settled all damage issues except the one presently before this court – whether the Plaintiffs are entitled to prejudgment interest on the damages paid by the City. The parties have briefed this issue which is now ready for resolution.

Although an award of prejudgment interest calculated from the date of the loss is the rule rather than the exception in cases brought under a district court's admiralty jurisdiction, a court may exercise its discretion to deny prejudgment interest if unusual circumstances exist. *See In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992). A court's discretion is not unbridled, but must be guided by "sound legal principles." *Albermarle Paper Company v. Moody*, 422 U.S. 405, 416 (1975). The Fifth Circuit recently suggested a number of these principles when it approved a jury instruction which charged:

> In admiralty cases, the award of pre-judgment interest from the date of the loss is the rule rather than the exception. The decision to deny pre-judgment interest must be based on the existence of peculiar circumstances because pre-judgment interest is awarded as a compensation for a wrong done. It is your responsibility to determine whether to award McDermott, Inc. pre-judgment interest. If you determine that the – that the Plaintiff is entitled to pre-judgment interest; that is, interest from the date of the loss until the date you render your verdict, you must determine the rate at which the interest will be calculated. The circumstances which may justify denial of an award for pre-judgment interest are as follows: A genuine dispute over a good faith claim exists in a mutual fault situation – mutual fault setting; the damages awarded are substantially less than the amount claimed by the Plaintiff; the Plaintiff's contributory negligence is to such a magnitude as to make an award of pre-judgment interest inequitable.

McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1080 n.17 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3653 (March 12, 1993) (No. 92-1479). *See also Inland Oil and Transport Company v. Ark-White Towing Company*, 696 F.2d 321, 327-29 (5th Cir. 1983).

In the instant case the record shows that from the outset there has been a genuine dispute over the Plaintiffs' good faith claim that the City of Milwaukee was negligent for failing to warn the agents of the Defendants (who were planning to leave the FORD unmanned during the Christmas holidays) that a winter storm could create conditions in the outer harbor at Milwaukee which could damage the ship. The trial court and the court of appeals both found mutual fault for the damage which ensued to the ship and to the Defendant's dock. The court of appeals ascribed two-thirds of the negligence to the Defendant. Thus, in this situation the court concludes that the Plaintiffs' contributory negligence was of such magnitude that an award of prejudgment interest would be inequitable.

One rationale for awarding prejudgment interest is that, from the date of loss, the shipowner has been deprived of the use of the ship or the money expended to replace or repair the vessel, while the other party has enjoyed the use of its money for the same time period and could be accruing market rate interest on the funds. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d at 1331. The City of Milwaukee is not in this position. As a municipality, it has no power to set aside an interest bearing fund at the time of a loss, but can only levy taxes to pay a settlement or final judgment. *See* Wis. Stat. ch. 62. Therefore, this unique circumstance also leads the court to

conclude that prejudgment interest is unwarranted in this case.

For these reasons, the court ORDERS that the Plaintiffs' request for prejudgment interest on the amount paid in settlement by the Defendant IS DENIED.

IT IS FURTHER ORDERED that, all issues in this case having been resolved, this action is dismissed upon its merits.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 58, the Clerk of Court shall enter a final judgment as a separate document. This judgment shall provide that:

> This action came on for a hearing before the Court, Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.
>
> IT IS ORDERED AND ADJUDGED that the Defendant City of Milwaukee is not liable to the Plaintiffs for payment of prejudgment interest on the amount paid in settlement.
>
> IT IS FURTHER ORDERED AND ADJUDGED that this action is dismissed upon its merits.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 28th day of May, 1993.

/s/ Thomas J. Curran
Thomas J. Curran
United States District Judge

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL., IN OPPOSITION

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STATUTES

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STATEMENT OF THE CASE

Respondents agree with Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Petitioner argues that this Court should accept certiorari, reverse the Seventh Circuit, and hold that the existence of a genuine dispute regarding liability, which courts have noted generally arises in a mutual fault setting, is a "peculiar circumstance" which justifies a denial of prejudgment interest. (Petition 8, *citing Inland Oil & Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983)). Petitioner correctly points out that the Seventh Circuit, citing this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), found that the rationale which dictated that prejudgment interest be discretionarily allowable in cases of mutual fault was obviated by the abrogation of the equal division of damages rule. (Petition 8a, 9a). Petitioner states that the Seventh Circuit's holding is erroneous because 1) *Reliable Transfer* "did not discuss, much less address, the question of whether mutual fault justifies denial of prejudgment interest because that question was not before the court;" and 2) the fact that Respondent was found to be more at fault than Petitioner justifies denial of prejudgment interest (Petition 9).

The reasons advanced by Petitioner do not warrant granting the Petition for several reasons. First, this Court has approved of an award of prejudgment interest in a mutual fault admiralty collision case in *The Manitoba*, 122

U.S. 97 (1887). Second, contrary to Petitioner's assertions, this Court's ruling in *Reliable Transfer* precludes a decision not to award prejudgment interest on the basis of mutual fault of the parties. Finally under *Reliable Transfer*, degree of fault is an irrelevant and unwarranted consideration in a court's exercise of discretion not to award prejudgment interest in a mutual fault setting, because it has already been taken into account in determining liability.

I. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THIS COURT HAS ALREADY APPROVED OF AN AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT, ADMIRALTY COLLISION CASE.

Over one hundred years ago this Court determined that an award of prejudgment interest in a collision involving mutual fault is proper. In *The Manitoba, supra*, this Court considered a case involving two vessels, i.e., the Propeller Comet and the Steamboat Manitoba, which collided in Lake Superior in 1875. As a result of the collision, the Comet sank and was a total loss. The Manitoba incurred damages in the amount of $5,000.

Nine days after the accident the owners of the Comet commenced an action in admiralty against The Manitoba and seized her. They sought damages in the sum of $70,125 including $30,000 for the loss of the Comet, $35,000 for her cargo and $5,125 for freight. The owners of The Manitoba appeared, answered, pleaded limitation of liability as a defense and posted a $28,694.95 bond for the release of The Manitoba. They also cross-libeled (cross-claimed) for damages to The Manitoba in the sum

of $5,000. The owners of the Comet answered the cross-libel and, in defense, pleaded discharge of liability based on the total loss of the Comet and her freight.

Trial of the case resulted in a finding of fault on the part of both vessels. The Comet was held to have the greater fault for actually initiating the collision course and then failing to stop and reverse her engines when it became apparent that a collision was going to occur. The Manitoba was held at fault for failing to stop and reverse her engines when it became apparent that a collision would occur. The divided damages rule was then in effect. This meant that the damages of each of the parties, plus prejudgment interest thereon from the date of the collision to the date of judgment, i.e., $85,818.16 for the Comet and $7,470 for The Manitoba, were to be added together and then divided equally so that each party would incur liability for damages in the sum of $46,644.08. Since the loss of the owners of the Comet, and her cargo and pending freight, was greater than that of the owners of The Manitoba by the sum of $78,348.16, one-half of that difference was $39,174.08. This Court held that the amount of the liability of the owners of The Manitoba to the owners of the Comet on the date of the judgment on a division of damages, after proper allowance to The Manitoba for her damage and without reference to limitation of liability, was $39,174.08. However, because the liability of the owners of The Manitoba was limited to the amount of the bond which had been posted to release the vessel with interest from the date of judgment, their liability was reduced to $32,090.45, even though The Manitoba was the vessel least at fault.

By its action, this Court specifically approved a result whereby mutual fault was not a reason to deny prejudgment interest, and in this case was not a reason to deny a recovery by the party with both greater fault *and* greater damages from the party less at fault which had incurred less damages. The court specifically stated as follows:

> This decree was proper in its figures. *Allowing interest on the damages from the date of the collision to the date of the decree, (which was proper,)* and fixing the liability for the $28,694.95 as of the date of the decree, (which was proper, in view of the fact that the condition of the bond was to 'abide and answer the decree,' and so the $28,694.95 did not carry interest prior to the date of the decree,) The Manitoba was liable to pay to the Comet $36,476.74, on a proper computation based on a division of the damages, according to the principle of computation hereinafter stated, and The Manitoba had the proper limitation of liability in paying only $28,694.95 at the date of the decree. The discrepancy between that amount and the amount stated in the bond is not explained, but is not remarked upon by the parties. The obligers in such a bond are not liable for interest prior to the decree of the district court, but are liable for interest from the date of such decree. *The Ann Caroline*, 2 Wall. 538 [1865]; *The Wanata*, 95 U.S. 600 [1877].

122 U.S. at 101-102 (emphasis added).

The decision of this Court in *The Manitoba* was 88 years prior to this Court's decision in *Reliable Transfer*, at a time when the equal division of damages rule was in full force and effect. *Reliable Transfer* abandoned the rule of divided damages (except when a court is unable to

apportion fault) and adopted the rule of true comparative negligence in maritime collision cases. Since this Court approved an award of prejudgment interest in a mutual fault situation against a party who was less at fault and sustained less damages at the time of the divided damages rule, *a fortiori* under the current rule of true comparative negligence, an award of prejudgment interest under similar facts should be mandatory, not discretionary, unless precluded by special circumstances such as undue delay in bringing or prosecuting suit (laches), exaggeration of claims, and other post-accident considerations.

At the beginning of the Conclusion section of its Petition, the Petitioner specifically states that "this Court has held that an award of prejudgment interest in admiralty 'rested in the discretion of the court below' ", *citing The Maggie J. Smith,* 123 U.S. 349, 356 (1887). Petitioner also states that in *The Maggie J. Smith,* "this Court held that denying prejudgment interest to a party found not to be at fault for a collision is a proper exercise of the district court's discretion." (Petition 14). What Petitioner does not note is the fact that *The Maggie J. Smith* concerned whether or not interest should be allowed upon a stipulation for value (bond) posted in a limitation of liability proceeding in admiralty. The question actually was whether or not the court should allow interest on the bond which evidently did not contain a provision therefor, such not being required at that time in the 1880s. As a matter of fact, the quotation from *The Manitoba,* set forth above, which was decided in advance of *The Maggie J. Smith,* specifically states that the obligers on a limitation of liability bond are not liable for interest prior to the decree (judgment) of the district court. Presumably, at the

time of the decisions in both *The Maggie J. Smith* and *The Manitoba*, there was no requirement for interest on the value bond. *See In re Harris*, 57 Fed. 243, 245 (2nd Cir. 1893). This was subsequently remedied by the statutory requirement for 6% interest on limitation of liability bonds in Rule 51 of the Admiralty Rules of Practice for the Courts of the United States, promulgated by the Supreme Court of the United States December 6, 1920, effective March 7, 1921, rescinded July 1, 1966, Benedict on Admiralty, Seventh Edition (Revised) (1994) pp. 91-94, and now in Rule F(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 71a to End, pp. 410-411 (1994), added Feb. 28, 1966, effective July 1, 1966. App. 1-5.

II. DISTRICT COURTS DO NOT HAVE THE DISCRETION TO DENY PREJUDGMENT INTEREST IN ADMIRALTY COLLISION CASES FOR MUTUAL FAULT BECAUSE OF THIS COURT'S DECISION IN *RELIABLE TRANSFER*.

This Court has recognized that "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310, n.2 (1987). In *West Virginia*, this Court held that the State of West Virginia was liable to the United States for prejudgment interest on a debt arising out of a contractual obligation to reimburse the Army Corps of Engineers for disaster relief services rendered by the Corps. Rejecting the State

of West Virginia's argument that it should not be liable for such interest, this Court declined to apply a "balancing of the equities" approach which Petitioner advocates here:

> The District Court held that whether interest had to be paid depended on a balancing of equities between the parties; the Court of Appeals rejected such an approach, *as do we*. This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest . . .

Id. at 311, n. 3 (emphasis added). This Court's decision in *Reliable Transfer* is consistent with *West Virginia's* mandate that prejudgment interest serves to compensate for loss of use of money due as damages, as its name implies, from the time of the damage to the time when judgment is entered.

The clear mandate and result of *Reliable Transfer* is that parties who are less at fault in a mutual fault collision case are no longer to be penalized by being forced to absorb damages disproportionate to their fault. Thus, the "balancing of the equities" approach, rejected by this Court in *West Virginia*, is neither appropriate nor necessary. That *Reliable Transfer* did not specifically address mutual fault in connection with an award or denial of prejudgment interest is irrelevant to this Court's general and overriding view that prejudgment interest is compensation for use of money. As this Court noted in *Reliable Transfer*, when discussing the rationale justifying application of proportionate fault, as opposed to the 100 year old equal division of damages rule, which it specifically overruled:

> "It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured or determined on a rational basis. The rule provided palpably unfair results in every other case. For example, where one ship's fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second." (Footnote omitted.)

Reliable Transfer, 421 U.S. at 405.

Courts have recognized that the comparative fault rule, which this Court established in *Reliable Transfer*, is in large part, designed to achieve a fair assessment of damages against each party according to each party's degree of fault. *See, e.g., Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988). The "unfair results" this Court had in mind, when it replaced the divided damages rule with the proportionate fault rule, clearly arose where one party's liability for the damages of another in a mutual fault collision case was disproportionate to the degree of fault of that party in causing the collision. Under this scenario, a penalty of sorts was levied against the less-at-fault party because that party was obliged to absorb one-half the damages (and interest) associated with the liability of the more-at-fault party. This resulted in the more-at-fault party

absorbing less than its fair share. *Cf. Alkmeon Naviera, S.A. v. M/V "Marina L."*, 633 F.2d 789, 798, n. 12 (9th Cir. 1980). Conversely, when a party's liability is assessed on the basis of that party's proportionate fault, the damages (and interest on *those* damages) square with the party's actual assessed responsibility in causing those damages. To deny prejudgment interest would be, therefore, redundant and, in addition, an unwarranted penalty.

The Sixth, Seventh and Ninth Circuits, as well as district courts in the First, Second, Third and Eighth Circuits, have explicitly or implicitly held that mutual fault *does not* constitute a special circumstance justifying the denial of prejudgment interest. *Cement Div. Nat. Gypsum Co. v. City of Milwaukee*, 31 F.3d 581 (7th Cir. 1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Alkmeon Naviera, supra*; *STARLIGHT I, Inc. v. Patriots Corp.*, No. 83-3783-Z, slip op. (App. 6) (D.C.Mass. 1985); *Trans Pacific Shipping Co. v. Smith-Rice Co.*, 1992 U.S.Dist. LEXIS 16,017 (N.D.Cal. 1992) (App. 19); *Granholm v. TFL Express*, 576 F.Supp. 435 (S.D.N.Y.1983); *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854 (E.D.Pa. 1977); *Lone Star Industries v. Mays Towing Co.*, 725 F. Supp. 440 (E.D. Mo. 1989) *rev'd on other grounds*, 927 F.2d 1453 (8th Cir. 1991). These cases are entirely consistent with *Reliable Transfer*. Nothing in *Reliable Transfer* dictates that an award of prejudgment interest should be treated any differently under the proportionate fault regime. To hold, as the Fifth and Eleventh Circuits do, that mutual fault justifies a denial of prejudgment interest, would amount to a double penalty levied on the more-at-fault party because that party's liability has already been accounted for in full at the liability allocation stage. As succinctly stated by one court:

> "Under the proportionate fault rule, the degree of each parties' (*sic*) fault is taken into account in the initial determination of recovery. This formula obviously extinguishes the harsh effects of the divided damages rule. Further, to take proportionate fault into consideration in deciding on an award of prejudgment interest would penalize a party twice for the same mistake. Therefore, our determination that [the party seeking prejudgment interest] was more negligent [than the party from whom interest was sought] will not be afforded any weight in our decision to award interest." (Footnote omitted.)

Complaint of B.F.T. No. Two Corp., 433 F.Supp. at 876. Petitioner's reliance is solely upon decisions in the Fifth and Eleventh Circuits, *Inland Oil, supra*, and *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591 (11th Cir. 1986), which are not only the minority rule, but are also erroneous.[1]

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[1] Two points are noteworthy with respect to this line of cases. First, the Eleventh Circuit generally follows the Fifth Circuit, as it was once a part of the Fifth Circuit. Second, the Fifth Circuit rationale for denying prejudgment interest in cases of mutual fault is unclear and confusing. In *Inland Oil, supra*, the Fifth Circuit states that its cases "have *consistently* upheld denials of prejudgment interest in cases of apportioned fault." *Inland Oil*, 696 F.2d at 328 (emphasis added). However, at no point in *Inland Oil* (or *Noritake v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980), for that matter) does the Fifth Circuit explain its rationale for departure from its earlier holdings in which mutual fault was not found to preclude an award of prejudgment interest. *See, Sinclair Refining, Co. v. S/S Green Island*, 426 F.2d 260 (5th Cir. 1970); *National Marine Service, Inc. v. Talley*, 348 F.2d 589 (5th Cir. 1965).

III. DEGREE OF FAULT SHOULD BE IRRELEVANT TO THE AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT SETTING.

Petitioner appears to argue, alternatively, that the greater fault of a party justifies a decision to deny prejudgment interest to that party in an admiralty collision case because "distortions in compensation" can occur. (Petition 14-15) As noted in the passage from *Complaint of B.F.T., supra,* under *Reliable Transfer,* such a position is untenable. *Reliable Transfer* stands for the proposition that distortions in compensation will no longer occur because the parties' liability is no longer subject to an arbitrary division of damages without regard to degree of negligence, but rather damages are to be allocated to parties in actual proportion to their relative degree of fault. Petitioner incorrectly argues that "distortions in compensation" can occur under both the equal division of damages rule and the proportionate fault rule, and that "the rule in *Alkmeon Naviera* can result, as in this case, in greater distortion in compensation in favor of the party who has the greater degree of fault than the equal division of damages rule." (Petition 15)

Implicit in the foregoing is the premise that a distortion in compensation occurs when the more-at-fault party sustains greater damages. Petitioner appears to argue that a penalty should attach in such a situation, and asks this Court to consider and ultimately adopt a *per se* rule that prejudgment interest is to be denied when the more-at-fault party sustains greater damages in order to avoid a "distortion in compensation." Such a rule would be inconsistent with *Reliable Transfer* because, under a proportionate fault regime, the measure of damages which a

party *sustains* has no bearing on its liability in the first instance and certainly no bearing on its compensation. The proportionate basis for compensation is determined when the negligence of the parties is compared and liabilities are assessed. In a mutual fault setting, prejudgment interest is assessed on *each party's* liability so that there is no distortion in ultimate compensation. Whether the offset is at the beginning on the assessed liabilities, with interest on the balance, or at the time of payment using totals of liability plus interest, the result is the same. To deny assessment of prejudgment interest would be to evoke a second penalty upon the party entitled to offset recovery based solely upon amount of damages, that party already having been penalized for its negligence in the assessment of liability.

In *STARLIGHT I, Inc.*, (App. 6) the United States District Court for the District of Massachusetts apportioned liability thirty percent to the plaintiff and seventy percent to the defendant. Even with the thirty/seventy apportionment, the District Court explicitly recognized that the plaintiff "had the use of thirty percent of the amount of the damages to [the defendant]," and offset the amount of interest owing on the defendants damages against the interest owing on the plaintiffs damages. App. 17. Thus, in a case with an even greater apportionment of fault than the immediate case, the "more at fault" defendant was correctly awarded prejudgment interest. An identical result (30/70 proportionate fault with the more at fault party recovering prejudgment interest on its greater damages from the less at fault party) was reached in *Matter of Getty Marine Corp. v. Jade Shipping Co.*, 1983 A.M.C. 550 (E.D. Va. 1982). These decisions are consistent

with the proportionate fault rule in *Reliable Transfer*, as well as the "time value of money" concept in *West Virginia*.

While prejudgment interest is an element of compensation, it is secondary to the measure of damages and, obviously, dependent upon it. Arguing that "distortions in compensation" occur with respect to an award of prejudgment interest in a situation where the party seeking interest is more at fault and has sustained greater damages is incongruous. It amounts to "mixing apples and oranges" under the rule articulated in *Reliable Transfer*. As such, Petitioner's reliance on *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982), and other Fifth Circuit decisions, is misplaced.

CONCLUSION

The Petition should be denied consistent with the rationale and actual holdings of this Court. In *The Manitoba* this Court approved of an award of prejudgment interest in a mutual fault admiralty collision case, implicitly recognizing that prejudgment interest is an element of compensation to which a party is entitled notwithstanding the degree of fault. Subsequent to that decision, in *West Virginia* this Court explicitly recognized that prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until the time that judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.

The result of this Court's decision in *Reliable Transfer*, while decided before *West Virginia*, is consistent with that case and with this Court's decision in *The Manitoba* in that parties who are less at fault in a mutual fault collision case are no longer to be penalized by being forced to absorb liability disproportionate to their fault. For the same reason, magnitude of fault is a consideration mal-apropos. In sum, a denial of prejudgment interest for mutual fault in an admiralty collision case would be redundant, would serve as a double penalty, and would subvert the reasons underlying this Court's holdings in *West Virginia* and *Reliable Transfer*. Anything other than a denial of this Petition would be inconsistent with those decisions.

Respectfully submitted,

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ADMIRALTY RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES

RULE 51 – Limitation of Liability – How Claimed

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U.S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment

into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and

causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

United States District Court
District of

Notice of Petition for Exoneration from or Limitation of Liability

(Filed ___)

Notice is given that ___ has filed a petition pursuant to Title 46, U.S. Code, §§ 183-189, claiming the right to exoneration from or limitation of liability for all claims

arising on the voyage of the vessel ___ from ___ to ___ terminating on ___.

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U.S. Court House at ___ and serve on or mail to the petitioner's proctors ___ at ___ a copy on or before ___ or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

_____

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.

Originally adopted in 1872 as Rule 54; renumbered in 1920, amended in 1891 and on June 21, 1948. Discussion, § 516.

Rule 51, requiring petition to plead facts and circumstances, contains no requirement for the pleading of legal conclusions: Blackler v F. Jacobus Transportation Co., 1960 AMC 581, 243 F2d 733 (CA 2, 1957).

Rule 51 gives the court power to enlarge the time for filing by allowing late claims: Petition of Tugboat Dalzellea, 1966 AMC 28 (SD NY, 1965).

STARLIGHT I, INC. vs. PATRIOTS CORPORATION
and the F/V PATRIOTS

STARLIGHT I, INC. v. PATRIOTS CORP.

CIVIL ACTION NO. 83-3783-Z

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Slip Opinion

August 9, 1985

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OPINION BY: ZOBEL

OPINION: MEMORANDUM OF DECISION

ZOBEL, D.J.

On September 15, 1982, the fishing vessels STARLIGHT I ("Starlight") and PATRIOTS ("Patriots") collided at sea in the Great Round Shoal Channel. Both vessels were damaged, and both parties, the corporate owners of the vessels, charge that the other vessel was primarily at fault in causing the collision. The case was tried before me without a jury on May 14 and 15, 1985. I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Great Round Shoal Channel (the "Channel") is the primary passage between Monomoy Island and Cape Cod

to the north and Nantucket Island to the south. It is the eastern entrance to Nantucket Sound and one of the routes used by fishing vessels steaming between New Bedford and the fishing grounds off Georges Bank. The eastern entrance to the Channel is marked by the "GRS" buoy. Proceeding east to west, the first nine nautical miles of the Channel, from "GRS" buoy to "GRC" buoy, follow a straight course. Both sides of the Channel are marked by numbered buoys along this portion: one, three, and five to the south, and two, four, and six to the north. At buoy one, the perpendicular width of the Channel is approximately two-thirds of a nautical mile.[1]

In the late afternoon of September 15, 1985, the Starlight, a western-rigged dragger owned by plaintiff, departed from New Bedford to drag for fish on Georges Bank. Her captain, Firmino Vaz Perreira, was at the helm and guided her through Nantucket Sound and into Great Round Shoal Channel. Approximately at the "GRC" buoy, fog began to set in, becoming heavy by the time she reached buoy three. Starlight was equipped with loran and radar, both of which were turned on. Perreira was using radar to navigate from one buoy to the next, passing to the north of the odd-numbered buoys and to the

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[1] I made this measure on the chart by plotting straight lines through buoys one and three and through buoys two and four. The width of the Channel is the distance from buoy one along a line perpendicular to the one-three line to the point of intersection with the two-four line. The perpendicular width of the Channel along this stretch is almost constant. Its narrowest measure, at buoy four, is .58 nautical miles. The perpendicular width contrasts with the diagonal measure directly from buoys one to two, a distance of just over one nautical mile.

south of at least two other vessels heading through the Channel in the opposite direction. At about buoy three, Perreira, feeling ill, left the pilothouse to go to the head. He left the helm with the mate, Joao Ferreira. Before leaving, Perreira identified a radar target, which he believed was another vessel, heading west about two or three miles from the "GRS" buoy. He directed Ferreira's attention to this other vessel and instructed Ferreira to proceed straight to buoy one. Because of the fog, he also slowed Starlight's speed from the 7 1/2 to 8 knots he had been steaming.

Ferreira testified that he took the helm at about buoy three, steaming at a reduced speed of 5 to 6 knots. Captain Perreira had drawn his attention to the approaching radar target. As he proceeded, converging with the target, Ferreira changed the range setting on the radar from eight to four to two to one-quarter miles, all the time monitoring the target's location. When he was within a quarter mile of the target, he also was within a quarter mile of buoy one. Ferreira believed that he had to pass inside the channel, that is, to the north of buoy one. He also saw on the radar screen that the other vessel, the target, was not allowing him sufficient way to pass between it and the buoy. He therefore decided to stop dead in the water and to let the other vessel pass. He continued to monitor the other vessel's position, but he did not realize that the tide and wind were turning the Starlight from its easterly heading to a northeasterly heading, which left her broadside in the Channel.

Ferreira first sighted the other vessel visually approximately one minute before the collision. The vessel was bearing down on the Starlight from her starboard side on

a course that would collide with Starlight's bow. Ferreira attempted to avoid the collision by sounding several whistle blasts and giving his engines full power forward,[2] but the other vessel hit the Starlight on her starboard side, about fifteen feet forward of her stern. After the collision, Perreira noted the loran readings for the Starlight's position as 1384 and 4384. These readings mark a position approximately one quarter mile west of buoy one and less than two-tenths of a mile perpendicularly from the southern boundary of the channel.[3]

At the time of the collision, the Patriots, a western-rigged scalloper, was steaming back to port after scalloping for about eight days. Her captain was off duty and asleep, and her mate, Philip G. Plante, was at the helm. From her last fishing position, Plante steamed on a northwest heading to the "GRS" buoy and passed to the south of it in thick fog. He had Patriots's radar and loran equipment on as he changed course to proceed through the Channel. On the radar, he identified buoys one and two, another vessel in the Channel about one and half miles ahead going in the same direction as the Patriots, and various targets outside the Channel, which did not concern him. He was steaming at approximately eleven

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[2] Although Captain Perreira was not in the pilothouse when the vessels collided, his testimony corroborates the sequence of actions taken by Ferreira. The captain heard the Starlight's engines slow, then the whistle blasts, and then the acceleration of the engines just before the collision.

[3] Philip Plante, mate of the Patriots, testified that he recalled a loran reading of 4341.5. I have found no markings on the chart that would place this anywhere near Great Round Shoal Channel.

knots. Plante testified that he passed within an estimated one hundred fifty feet of buoy one, close enough to see the glow of its light through the heavy fog. He was not particularly concerned with staying to one side of the Channel: "If there's nobody in the Channel, it's like driving down the road. If there's nobody in the road, the road's yours."

Plante never saw any indication of the Starlight on the Patriots's radar. He estimated that he first sighted the glow of Starlight's masthead light about one hundred fifty feet in front of him, while the Patriots was still proceeding at about eleven knots. As soon as he saw Starlight's green starboard running light, he determined her heading and threw the Patriots out of gear and then into reverse. He does not recall whether or not he turned the Patriots either to port or to starboard. Plante testified that the Starlight was crossing his bow from port to starboard, and that he heard her sound one whistle blast. By the time he collided with her aft quarter, he claims that Patriots was almost dead in the water. He described the collision as a "nudge" no greater than would be experienced in docking.[4]

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[4] I do not credit Plante's description of the collision as a soft nudge. At least one crewman on the Patriots's deck was knocked off his feet by the force of the impact. The parties have stipulated to the considerable damage suffered by both vessels. Furthermore, by my calculation, a boat traveling at eleven knots would cover one hundred fifty feet in less than ten seconds. Although I do believe that Plante reversed his engines and slowed the Patriots, I do not believe he could arrest her forward momentum in that short a space.

The force of the collision turned the boats side by side, their starboard beams touching and their bows pointing in opposite directions. There was no radio contact between them before or after the collision,[5] but crew members on both vessels were able to identify the name of the other during this close, slow passage. Defendant alleges, based on the testimony of two members of the Patriots's crew that the Starlight's fishing gear was in the water just after the collision, that the Starlight was fishing in the Channel when the collision occurred. Both Perreira and Ferreira deny that they were fishing. Because defendant's allegation is an element of its counterclaim that the Starlight was at fault, it bears the burden of proving that the Starlight was fishing. Although Perreira and Ferreira must be regarded as interested parties, their testimony that they were steaming through the Channel is consistent with their late afternoon departure from New Bedford. Defendant's witnesses also are interested parties, and it has offered nothing more, such as radar detection of the Starlight moving slowly outside the Channel, to further its hypothesis. On this state of the evidence, I find that defendant has failed to sustain its burden on this issue.[6]

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[5] Both parties have alleged that the other departed the scene of the collision first. I need not resolve this dispute. Although the failure to stand by and render necessary aid would constitute a violation of the International Rules of the Road, such a violation would have no causal relationship to the collision itself. Fortunately, both vessels returned safely to New Bedford under their own power.

[6] With respect to this issue, defendant is fishing for red herring. It suggests that fishing in the Channel would be negligent both per se and because it prevented Ferreira, upon seeing the Patriots, from reversing his engines.

Defendant's own expert, Lawrence O'Pezio, negated both theories of negligence. First, he testified that the appropriate navigational rule states only that a vessel fishing in a channel shall not impede the progress of a vessel steaming through the channel. Because the collision occurred in the "eastbound lane" of the Channel, the Starlight could not be considered to be impeding the westbound Patriots. Second, O'Pezio opined that Ferreira's movement forward was a reasonable and acceptable evasive maneuver in a close quarters situation.

I find that, just prior to the collision, both vessels were displaying adequate navigational lights. Neither vessel, however, was sounding a regular fog signal, nor had a watch posted in its bow. I also find, without any doubt, that the collision occurred on the south side of the Channel. Plante, defendant's mate, admitted this by his testimony that he passed within one hundred fifty feet of buoy one, and the position is confirmed by the loran readings taken by Perreira after the collision.

The parties have stipulated to the damages caused to each vessel by the collision. The repairs to the Starlight cost $44,789.30, and there were surveying costs of $1,428.23, for a total of $46,217.53. Patriots suffered a total of $9,108.53: $7,232.43 for repairs and $1,876.10 for surveying. The parties also stipulated that plaintiff, if it recovers any damages, is entitled to its lost profits for the period the Starlight was being repaired. The Starlight was unable to said [sic] from September 15 to October 23, 1982, a period of thirty-eight days. Calculating each trip to be eight or nine days of fishing and four days shore layover, the Starlight lost three trips. On its last three trips before the collision and first three trips after the

collision, the Starlight's average net boat share was $3,379.01 per trip. I therefore find that she lost profits in an amount of $10,137.03.

DISCUSSION

Having tried the case, both parties concede, as they must, that they were negligent in certain respects. The case therefore is one of mutual fault, and my task is to apportion the losses caused by the collision according to the respective degrees of negligence of the two vessels. United States v. Reliable Transfer Co., 421 U.S. 397 (1975). I assess the prudence of the vessels' various actions according to the International Rules of the Road for the Avoidance of Collisions at Sea and principles of good seamanship, as testified to by Lawrence O'Pezio, a qualified expert in marine navigation. I consider these actions in three categories: the vessels' general procedures under way in the conditions of that night; their courses and positions in the Channel; and their actions at close quarters after sighting one another.

Both vessels violated the Collision Rules by failing, while proceeding in fog, to sound regular fog signals or to maintain a lookout. These failures contributed to cause the collision because they diminished the time in which one or both of the vessels might have acted to avoid the collision. Minutes before the collision, both vessels also were violating the rules by steaming at unsafe speeds, given the weather conditions. The Starlight's speed violation, however, was removed as a cause of the collision when she stopped before approaching too closely to the Patriots. Although the Patriots slowed before actually

hitting the Starlight, her speed was a contributory cause because she was still steaming unreasonably fast when her mate spotted the Starlight. At that point, his ability to react was hampered by the speed at which he was steaming.

The course pursued by the Starlight was negligent in two respects, both related to Ferreira's reactions to the approaching radar target. First, in a technical sense, Ferreira failed to assess the risk of a collision with the Patriots. This violation lay in his failure to plot the Patriots's course and to adopt an alternative course, possibly one outside the Channel. This, however, was only a partial or technical omission, because Ferreira did not continue to steam without regard for the other vessel. He did take some evasive action – he stopped – based on the risk of a collision. The Starlight's second fault in maneuvering, and its primary act of negligence, was to stop dead in the water. By doing so, she became less maneuverable and drifted into a more vulnerable position in the Channel. Again, however this aspect of the Starlight's negligence is mitigated in that, by slowing to a stop, Ferreira removed the opposite violation of proceeding at excessive speed under the circumstances.

In contrast to the Starlight's negligent maneuvering in reaction to its radar sighting of the Patriots, the Patriots's omissions proceed from Plant's [sic] failure ever to observe the Starlight on the Patriots's radar. Although O'Pezio testified that the failure to detect a radar target is not a violation of the Collision Rules, it is an act of negligence when the vessel continues to steam without caution for the fog, presumably in misplaced relianceupon its inaccurate radar observations. Plante's belief

that the road was his led him to navigate at excessive speed on the port side of the channel, a clear violation of the rules. This fact was the primary cause of the collision. Despite the Starlight's imprudent maneuver and even the Patriots's excessive speed, the collision would not have occurred had the Patriots passed properly farther to the north.

Finally, I find no fault in the emergency actions taken by either mate at close quarters. O'Pezio testified that any action reasonably calculated to avoid a collision is proper when the vessels are in extremis. Both Ferreira's full power forward and Plante's attempt to stop constitute such reasonable actions.

I conclude that liability for the collision should be borne seventy percent by defendant and thirty percent by plaintiff. Plaintiff therefore is entitled to $39,448.19, seventy percent of the total of the amount for repairs to the Starlight, survey of the Starlight, and detention damages. Defendant is entitled to a set-off against this amount of $2,732.56, thirty percent of the damages to the Patriots. Plaintiff's recovery, without prejudgment interest, is $36,715.63.[7]

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[7] This figure also results from adding the total damages caused by the collision, including plaintiff's detention damages ($65,463.09); calculating seventy percent of that figure to determine the share for which defendant is liable ($45,824.16); and subtracting the amount already paid by defendant ($9,108.53). This methodology parallels that formerly used under the rule of divided damages. See United States v. Reliable Transfer Co., 421 U.S. 397, 400 n.1 (1975).

The only remaining issue is whether plaintiff is entitled to recover prejudgment interest. The general rule in admiralty cases is that prejudgment interest is to be awarded absent special or extraordinary circumstances. See Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565, 574 (7th Cir. 1984). Defendant argues that such circumstances exist here because plaintiff did not commence its suit until fourteen months after the collision, because plaintiff has not established an adequate evidentiary foundation for interest, and because the collision resulted from the parties' mutual fault. I disagree and exercise my discretion to award interest as calculated below.

I do not find plaintiff's delay of fourteen months to be unreasonable or inexcusable. By affidavit, plaintiff has offered the post-trial explanation that it was waiting for the results of the Coast Guard inquiry into the collision before filing its complaint. I will not strike this affidavit. At the conclusion of the trial, the parties reserved the prejudgment interest issue and other evidentiary matters for further briefing and submissions, and defendant has suffered to [sic] prejudice by the post-trial submission of plaintiff's affidavit. Similarly, I will accept plaintiff's attorney's sworn statement that the bill for repairs to the Starlight was paid on December 4, 1982. At trial, extensive proof of the repairs to both vessels was obviated by stipulation. I will not now foreclose a part of plaintiff's recovery on the ground that the stipulation omitted a minor, indisputable fact.

Some courts have indicated that mutual fault should be considered as a factor opposing the award of prejudgment interest because it increases uncertainty as to liability. See, e.g., Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1196-97 (5th Cir. 1982); First National Bank of Chicago v. Material Service Corp., 597 F.2d 1110, 1121 (7th Cir. 1979). But even these cases do not establish a per se rule against prejudgment interest in mutual fault cases, and other courts have questioned the rationale for considering mutual fault in determining prejudgment interest. See Alkmeon Naviera, S.A. v. M/V Marina L, 633 F.2d 789, 797-98 & n.12 (9th Cir. 1980); Algonquin Deep Sea Research Corp. v. Perini Corp., 353 F. Supp. 561, 565 (D. Mass. 1973). I am persuaded that the purpose of compensating an injured party fully will be served only by awarding plaintiff prejudgment interest on that portion of the damages attributable to defendant's fault.

The interest rate to be used is discretionary. I look for guidance to the statutory rate awarded in Massachusetts tort cases, Mass. Gen. Laws Ann. ch 231, @ 6B (West 1985), which agrees approximately with the cost of borrowing money at favorable rates, and set the rate for this case at twelve percent. See Central Rivers Towing, 750 F.2d at 574. This interest rate must be applied to each item of damages separately. Interest on plaintiff's detention damages will commence on October 23, 1982, the date the Starlight sailed again and her lost profits were fully accrued. Interest on the amount for physical damage to the Starlight will run from December 4, 1982, the date plaintiff paid for the repairs. Plaintiff, however, had use of thirty percent of the amount of the damages to the Patriots. In the interest of fairness, I will presume that

defendant paid for those repairs on the same date. Accordingly, the amount of the principal accruing interest from December 4, 1982 will be reduced by $2,732.56.[8]

CONCLUSION

I find that the collision was caused seventy percent by defendant's fault and thirty percent by plaintiff's fault. Judgment will enter for plaintiff in the amount of $36,715.63, plus prejudgment interest of $12,803.75 as of August 9, 1985.

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[8] The Clerk of Court has calculated the amount of prejudgment interest, at the annual rate of twelve percent, as follows: From October 23 to December 4, 1982, $7,095.92 (seventy percent of $10,137.03) earned interest of $993.43. From December 4, 1982 to August 9, 1985, the total amount of $36,715.63 earned interest of $11,810.32. Thus, as of August 9, 1985, the total amount of prejudgment interest is $12,803.75.

TRANS PACIFIC SHIPPING CO., Plaintiff, -vs.- SMITH-RICE CO. and AMERICAN NAVIGATION CO., Defendants. SMITH-RICE CO., Third-Party Plaintiff, -vs.- SCHNITZER STEEL PRODUCTS CO., INC., Third-Party Defendant.

No. C 89-3673 MHP

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 16017

October 14, 1992, Decided
October 14, 1992, Filed and Entered

JUDGES: PATEL

OPINION BY: MARILYN HALL PATEL

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit arises from damage sustained by the M/V PACGLORY ("PACGLORY"), owned by Trans Pacific Shipping Co. ("Trans Pacific"), when the propeller of the PACGLORY was fouled by an anchor wire extending from a derrick barge operated by Smith-Rice Co. ("Smith-Rice"). Third-party defendant Schnitzer Steel Products Co., Inc. ("SSP") is the operator of a waterfront scrap metal facility adjacent to the Oakland Estuary. SSP leases the facility from the Port of Oakland. The PACGLORY was attempting to depart from a berth operated by SSP when the accident occurred.

FINDINGS OF FACT

1. The PACGLORY is a bulk cargo ship which was and is owned and operated by Trans Pacific. At all times

relevant to this litigation the PACGLORY was managed by Trans Pacific's agent, Lasco Shipping Co. Joint Stmt. of Agreed Facts at 1.

2. The SSP facility has numbered berths and piers for ships to call and load scrap steel. Id.

3. Smith-Rice, among other activities, operates derrick barges. Smith-Rice is the owner of Crane Barge Number 5 (BARGE 5), the barge moored at SSP berth 2 at the time of the accident. Id.

4. SSP leases Pier Number 2 from the Port of Oakland. The Port of Oakland demolished approximately one half of the overall length of Pier Number 2 prior to 1987. As a result, SSP could no longer load scrap steel onto ships from that pier. Tr: Vol. 1-21:4-6; Tr. Bosserman.

5. In early 1987, SSP considered various new loading methods before deciding to use a crane barge to load ships calling at berth 2, the berth served by pier 2. The procedure finally adopted contemplated positioning a crane barge adjacent to the quay wall of berth 2. The ship was to be loaded would lie outboard but adjacent to the crane barge. Joint Stmt. at 1.

6. In the summer of 1987, after receiving bids on the new loading procedure from several companies, SSP hired Smith-Rice to load ships at SSP's berth 2. Id.; Tr. Bosserman.

7. Following the selection of Smith-Rice, SSP hired David Seymour, a naval architect to draw a plan for a mooring arrangement for ships loading at berth 2. This plan does not show the placement of the barge anchor

wires. Pl. Ex. 2; Joint Stmt. at 2. Albert Petty, the operations manager for Smith-Rice in 1987 was familiar with this plan. Tr. Vol. 1-21:22.

8. The intended procedure was as follows:

Before a ship arrived at berth two, a Smith-Rice tug would tow BARGE 5 to berth 2 where the barge would be positioned with its starboard side adjacent to the quay, the bow facing into the estuary. The crane boom rest was located on the bow of the barge and the crane machinery turret was located on the stern. Several soft (synthetic) lines and one steel wire running from the starboard stern fairlead to a bollard ashore secured the barge to the quay. Three additional steel wires ran to unbuoyed anchors from fairleads of the port stern and the port and starboard sides of the bow. Each of the anchors was a 16,000 pound navy "stockless" anchor. Joint Stmt. at 2. The wires were one and three-eighths inches in diameter and weighed three and one-half pounds per foot. Tr. Vol. 1-131:13.

9. Albert Petty of Smith-Rice designed the anchoring arrangement for the barge. Petty discussed the anchoring arrangement with Barry Bosserman, the ship loading superintendent for SSP, Harold Pollack, Director of Purchasing for SSP, and Gary Schnitzer, executive vice-president and general manager of SSP. Tr. Vol. 1-53:1-3, 119:20-25. SSP approved the anchoring arrangement proposed by Smith-Rice.

10. Smith-Rice stopped using the mooring arrangement requiring bow anchor wires after the anchor wire fouled the PACGLORY's propeller. Smith-Rice continued to use a crane barge to load ships calling at berth 2.

11. Smith-Rice did not discuss the mooring arrangement with Trans Pacific or warn anyone on the PACGLORY or any pilot about the presence of the anchor wires although it was aware vessels entering berth 2 would have to pass over the anchor wire and was aware that when moving and positioning the barge the anchor wire would be unlikely to pass under the PACGLORY near the propeller. Id. at 53:10-16, 155:13-16, 161:19-21, 163:10-13.

12. Smith-Rice maintains it informed SSP that the starboard bow anchor wire would be placed as straight as possible along the dock and that the port bow anchor wires would be placed at an angle favoring the port bow. This angle was necessary to ensure that BARGE 5 would not be damaged by contact with the irregular surface of the side of the quay. Tr. Vol. 1-51:7-8; 55:18-20; Pl. Ex. 5. The anchor wires were also used to move the barge along the side of the vessel. Tr. Vol.1-139-40.

13. SSP asserts that it understood the bow anchor wires would be placed parallel to the sides of the barge, sixty to seventy feet from the plane of the side of the barge and the ship, approximately sixty feet west of the placement indicated by Smith-Rice. Tr. Bosserman; Pl. Ex. 5; Bosserman Dep. at 34-35.

14. SSP did not ask for written confirmation of the location of the anchor wires or independently confirm the location of the anchor wires prior to the arrival of the PACGLORY at berth 2. Tr. Bosserman.

15. Bosserman states that during the day he remained on BARGE 5 approximately ninety-five percent of the time watching the loading operation. He should

have observed the direction of the anchor wires and confirmed the location. Tr. Bosserman.

16. Movement of the barge along the vessel created tension in the anchor wires. The anchor wires were visible when under tension. Tr. Bosserman. Smith-Rice's policy was to slacken the anchor wires to the bottom when vessels entered or departed berth 2 because the anchor wires under tension created a potential hazard to navigation. Id. at 55:16-24. Smith-Rice assured SSP it would slacken the wires when vessels entered or departed berth 2. Bosserman Dep. at 35-36.

17. The anchor wires were not marked with a buoy because the crown wire coming up from the anchor to the buoy created a navigation hazard to vessels coming in and out of the berth without marking the exact location of the anchor. Id. at 55:12-14, 128:11-19. No rule requires SSP or Smith-Rice to mark the anchors.

18. After the barge was secure, the ship to be loaded at berth 2 was moored so that the ship's port side would be adjacent to BARGE 5's port side. BARGE 5 moved forward and backward between the ship and the quay wall to load the various holds of the ship. Joint Stmt. at 3.

19. The M/V PACEMPEROR, a bulk carrier 607 feet long, was the first ship loaded in this manner. See Pl. Ex. 5, an aerial photograph of the PACEMPEROR. From late 1987 through early 1988, three more ships were loaded without incident using the same loading process and mooring arrangement. Joint Stmt. at 3.

20. Petty was present and placed the anchor wires for these first four vessels, but did not personally place

the anchors prior to the arrival of the PACGLORY. Tr. Vol. 1-71:3-8.

21. At 1712 hours, April 29, 1988, the PACGLORY arrived at the SSP facility and moored to berth 6, the berth west of berth 2. Loading commenced that evening and continued through early afternoon on April 30. The records show that the vessel was partially laden with steel shred and drew sixteen feet four inches at the bow and nineteen feet seven inches at the stern. Joint Stmt. at 3.

22. On the morning of April 30, 1988, BARGE 5 was moved into position and secured at berth 2 in preparation for PACGLORY'S arrival. PACGLORY would remain at berth 2 for further loading. At 1630 hours, April 30, 1988, the PACGLORY was shifted from berth 6 to berth 2, under the guidance of Pilot Capt. Joseph Devine. Id.

23. Pilot Capt. William Greig, a pilot trainee, was aboard the PACGLORY on April 30, 1988 during the shift to berth 2. Capt. Greig observed ten to fifteen feet of exposed wire extending from the port bow into the water. The wire was under some tension contrary to the Smith-Rice practice to slacken the wires. Greig Dep. at 56:16-17, 57:7-9.

24. Although Capt. Kim, the master of the PACGLORY at the time of the accident, states he does not remember seeing BARGE 5 when the PACGLORY entered berth 6, prior to leaving berth 6 he knew BARGE 5 would be used to load the vessel. He knew the barge would move back and forth along side the dock to load the vessel before leaving berth 6. Kim Dep. at 51:13-16; 53:1-25.

25. Capt. Peter Richards, the Lasco port captain showed Capt. Kim Pl. Ex. 2, the Seymour drawing of the mooring plan for berth 2. SSP did not mark the location of the anchor wires on this copy of the drawing. Capt. Kim asserts he did not know about the bow anchor wires prior to April 30, 1988. Id. at 54:11-20.

26. Capt. Kim did not inquire about the mooring arrangement of BARGE 5 between April 30 and May 4, 1988, while the PACGLORY was loading at berth 2. He observed the barge move back and forth along side of the PACGLORY fifty to one hundred times during that period. Id. at 65:20-24; Tr. Vol. 1-174:10, 174:16.

27. Smith-Rice did not communicate with the PACGLORY about the location of the anchor wires. It relied on SSP to communicate that information. Tr. Vol. 1-176:11-18; 178:21-24.

28. Floating derrick crane number 53, operated by Great Lakes Dredge and Dock Company, was positioned forty feet west of the former SSP pier 2, to the starboard side of the PACGLORY at 9:30 a.m. on May 4, 1988. The crane was idle at the time of the shift but was manned and engaged in demolition of SSP pier two. Pl. Ex. 20.

29. As a result of the presence of this barge, a vessel attempting to enter or exit berth 2 could not safely maneuver around a port bow anchor placed in the location identified by Smith-Rice.

30. On May 4, 1988 the PACGLORY was to be shifted from SSP berth 2 to SSP berth 6 to complete loading. Acting as agent for Lasco, Barry Bosserman called two tugs. Tr. Bosserman.

31. SSP did not inform the dispatcher, the tug pilots, or S. Joo Kim, Captain of the PACGLORY, of the location of the anchor wires, or that anchor wires were in use, although a radio was available to call the bridge of the ship. Moreover, SSP did not instruct Smith-Rice to communicate with the PACGLORY about the location of the anchor wires. Id. SSP should have warned the dispatcher, the pilot and the master about unmarked hazards such as the anchor wires.

32. SSP informed tug pilot, Capt. Hume about the anchor wires and relied on Capt. Hume to communicate this information to the pilots operating in the area. Id. This system was ineffective and unreliable because there are a large number of independent pilots and it is not likely that they would receive this information. In May 1988, a total of sixty-two pilots could have been called by SSP. SSP should have notified the dispatcher about the anchor wires. Tr: Figare.

33. Two tugs, the HONDO and the BOBBIE JO arrived at berth 2 and began to assist the PACGLORY at 10:05 a.m., May 4, 1988. Pl. Ex. 26.

34. Pilot Capt. Nicholas Ernser boarded the PACGLORY at 9:50 a.m. on May 4, 1988 to pilot the vessel during the transfer to berth six. Id. Capt. Ernser was employed by the master of the PACGLORY.

35. Between 9:50 a.m. and 9:56 a.m. Capt. Ernser checked the lines and the draft of the PACGLORY and checked the tide. He did not ask about any soundings that may have been taken, but concluded the keel of the vessel had one half inch clearance. Tr. Ernser.

36. With the tug BOBBIE JO on the starboard midship and the tug HONDO on the starboard, Capt. Ernser ordered the PACGLORY engines dead slow astern at 10:11 a.m. At that time BARGE 5 began to move along with the vessel and the soft lines of BARGE 5 began to strain. Capt. Ernser experienced no difficulty moving the PACGLORY astern. Capt. Ernser was standing on the port wing of the bridge while giving his commands. Pl. Ex. 21; Tr. Ernser.

37. Capt. Ernser ordered the engines to stop at 10:12 and attempted to move the vessel away from the quay once again with "slow bells" at 10:13 a.m. Again the barge moved with the vessel. Id. By this time, the port bow anchor wire had fouled the propeller of the PACGLORY.

38. Capt. Ernser could not see the anchor wires and relied on the account of an unidentified person on the barge who confirmed that anchor wires were out and confirmed the location of the anchor wires. Pl. Ex. 9; Tr. Ernser.

39. Capt. Ernser was aboard the PACGLORY for six minutes before attempting to move the vessel. He observed wires extending straight up and down from the bow and stern of the barge and assumed the anchors were directly under the barge. He did not attempt to determine the specific location of the anchors. He received no notice about the anchor wires from SSP or the master of the PACGLORY. Tr. Ernser.

40. The custom and practice in the shipping industry requires the party hiring a pilot and the agent of the wharfinger to notify the tug pilot, the ship pilot, and/or

the dispatcher of any unusual circumstances in a particular berth. Id.; Tr. Figare. SSP and Trans Pacific did not conform to this practice.

41. The tug HONDO did not experience any difficulty pulling the PACGLORY away from the dock. The maneuver did not require additional power. No unusual mud was evident from the wheel wash when the PACGLORY engine engaged. Tr. Cloes.

42. The tugs HONDO and BOBBIE JO were able to move the PACGLORY only fifty feet away from the dock before moving out into the estuary because the Great Lakes crane barge was positioned on the starboard side of the PACGLORY. Tr. Cloes.

43. Although no conditions prevented shifting the PACGLORY by tug power alone, using the ship's engine with a tug assist was consistent with common practice. Tr. Cloes.

44. According to soundings taken by SSP and an independent expert, the PACGLORY was afloat or barely touching the mud at 10:11 a.m. on May 4, 1988 when the stern engine engaged. Pl. Ex. 19. The water depth at the stern of the vessel was between 31.0 feet and 31.6 feet. The PACGLORY needed 31.08 feet elevation for the keel to clear the bottom on May 4, 1988. Pl. Ex. 23.

45. The distance between the lowest point of the propeller and the bottom of the keel was 1.69 feet (20.28 inches). Pl. Ex. 58; Tr. Tillett. The propeller requires 29.4 feet to clear the bottom. If the water depth at the propeller was 31.0 feet, the propeller cleared the bottom by 1.69 feet (19 inches). It is unlikely that a wire lying flat on

the bottom would have fouled the propeller of the PACGLORY even if the keel was actually touching the bottom. Tr. Tronoff.

46. When the port bow anchor wire of BARGE 5 was under tension it was an obstruction to navigation. Tr. Figare.

47. The port bow anchor wire of BARGE 5 was placed in the path of the PACGLORY. The PACGLORY could not safely maneuver around the wire. The wire was an obstruction to navigation.

48. The port bow anchor wire fouled the propeller of the PACGLORY sometime after the PACGLORY arrived at SSP berth 2.

49. The port bow anchor wire of BARGE 5 was severed between the propeller of the PACGLORY and the port bow anchor of BARGE 5. Tr. Vol. 1-94:19-21.

50. The portion of the port bow anchor that fouled the propeller of the PACGLORY was not lying flat on the seabed when it fouled the propeller.

51. The damage to the PACGLORY is causally related to the fouling of it's [sic] propeller by the port bow anchor wire of BARGE 5. This damage is a result of the placement of the wire.

52. The parties do not dispute that the amount of damages sustained by Trans Pacific total $178,057.58.

CONCLUSIONS OF LAW

1. This court has jurisdiction and venue over this action pursuant to the admiralty and maritime laws of the

United States. 28 U.S.C. § 1333; Fed. R. Civ. P. 9(h); 29 U.S.C. § 1391(b).

2. Where a vessel at the time of a collision is in violation of a statutory rule, well-established admiralty law provides that a presumption of fault arises and the burden is upon the violator to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been". The Steamship Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 136 (1873).

3. The Pennsylvania Rule applies even though comparative fault is now applied in maritime collision cases. See Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 822-25 & n.1 (9th Cir. 1988) (applying the Pennsylvania Rule and the comparative negligence standard adopted in United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975)).

4. Under the Pennsylvania Rule this Circuit has held that once a violation is established the burden of overcoming the Rule's presumption is by clear and convincing evidence. Id. at 825.

5. Section 409 of the Rivers and Harbors Act, 33 U.S.C. § 409, provides in pertinent part that:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft. . . .

6. The waterway involved here is a "navigable channel" within the meaning of section 409. United States v. Osage Co., Inc., 414 F. Supp. 1097, 1102 (W.D.Pa. 1976); United States v. Cavalliotis, 105 F. Supp. 742, 743

(E.D.N.Y. 1952); National Forwarding Co. v. Payne, 297 F. 663, 664-66 (S.D.N.Y. 1923).

7. Since the purpose of section 409 is to prevent collisions, Allied Chemical Corp. v. Hess Tankship Co. of Delaware, 661 F.2d 1044, 1060 (5th Cir. 1981), it is a statutory regulation within the meaning of the Pennsylvania Rule. See Orange Beach Water, Sewer and Fire Protection Auth. v. M/V Alva, 680 F.2d 1374, 1380-81 (11th Cir. 1982).

8. Smith-Rice's placement of the port bow anchor wire constituted an obstruction within the meaning of section 409 and, therefore, was a violation of section 409.

9. Liability for violation of section 409 is not limited to the barge operator, Smith-Rice. Where the wharfinger has approved the anchoring arrangement that causes an obstruction in violation of section 409 it is also liable for the violation.

10. SSP hired Smith-Rice to establish a loading system, approved the anchoring arrangement for the system, was fully aware of the use of unmarked anchor wires, regularly observed the loading operation and had a duty to prevent obstruction of the navigable channel. Therefore, SSP is also liable for a violation of section 409, and the court finds that the presumption of the Pennsylvania Rule operates with equal force to both Smith-Rice and SSP.

11. Furthermore, wharfingers have a "duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or

warn the ship of any hidden hazard or deficiency known to the wharfinger or which in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the ship owner." Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1152 (5th Cir. 1990) (quoting Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A., 521 F.2d 229, 230 (5th Cir. 1975), cert. denied, 435 U.S. 924 (1978)).

12. SSP is a wharfinger. It leased the pier, had control over the pier and operations at it, contracted for berthing of the PACGLORY, oversaw the berthing and loading of vessels at the pier and regularly observed the loading operations. See, e.g., United States v. City of Redwood City, 640 F.2d 963, 967-68 (9th Cir. 1981) (party which owned piers, provided berth, patrolled them and checked for problems in berth area treated as wharfinger); Bangor & Aroostook R.R. Co. v. The Ship Fernview, 455 F. Supp. 1043, 1062 & n.52 (D.Me.1978) (applying definition pursuant to Maine statute); Black's Law Dictionary 1595 (6th ed. 1990) (defining a wharfinger as the "owner or occupier of a wharf; one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf").

13. SSP breached its duties as a wharfinger by creating and allowing the existence of a hazard that obstructed safe berthing and by failing to warn the vessel of the hazard.

14. Another presumption in the assignment of fault is implicated here. Where a moving vessel strikes a stationary object there is a presumption that the moving

vessel is at fault. Wardell v. DOT, Nat. Transp. Safety Bd., 884 F.2d 510, 512 (9th Cir. 1989). The presumption operates to make a prima facie case against the vessel and shifts the burden of persuasion to the vessel. To overcome the presumption the vessel must show that it "did all that reasonable care required." Boudoin v. J. Lay McDermot & Co., 281 F.2d 81, 88 (5th Cir. 1968) (quoting L. Hand, J. in The Hylas, 1925 A.M.C. 921, 925 (S.D.N.Y. 1913)).

15. However, the presumption is defeated where the shipowner, his employees or agents have no knowledge of the stationary object. Delta Transload, Inc. v. M/V Navios Commander, 818 F.2d 445, 450 (5th Cir. 1987). The port bow anchor wire is a stationary object within the meaning of Delta Transload.

16. Ordinarily the "shipowner . . . bears the responsibility for the acts of the pilot." Guangco v. Edward Shipping & Mercantile, S.A., 705 F.2d 360, 362 (9th Cir. 1983). The antecedents to this rule are long and venerable. See Sherlock v. Alling, 93 U.S. 99, 106-08 (1876); The Merrimac, 81 U.S. 199, 203 (1871); The China, 74 U.S. 53, 64 (1868). In 1901 the Supreme Court distinguished this long line of cases and found that the rule did not apply where state law compelled the owner to accept the pilot. Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U.S. 406, 416-17 (1901).

17. The general rule imputing liability of the pilot to the shipowner applies in this case, and the parties do not argue to the contrary. Thus, the exception in H. Ramsdell Transportation does not excuse Trans Pacific. For the reasons set forth in paragraph 18 below the court finds that the presumption articulated in Wardell applies.

18. In this case, the operators of the vessel had knowledge of the existence of the anchor wire, although they did not know its exact location at the time of the accident. The fact that the wire was not immediately visible does not relieve Trans Pacific of the presumption. Trans Pacific was aware of the loading system. The master of the vessel failed to inquire about the location of the port bow anchor wire before moving the vessel. Pilot Greig, for whose conduct Trans Pacific is responsible based upon the authorities in paragraph 16 above, had seen the exposed wire. Thus, Trans Pacific was on notice of the anchor wire and failed to further inquire about or confirm its location.

19. The doctrine of res ipsa loquitor [sic] does not apply to the facts of this case. Res ipsa permits the drawing of inferences from unexplained events. In the context of admiralty law, the doctrine is another species of the rule articulated in Wardell. See Brown Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F.2d 724, 726 (5th Cir. 1967). In order for the doctrine to apply three criteria must be met: 1) the injured party must be without fault; 2) the cause of the injury must be under the exclusive control of the defendant; and 3) the accident would not ordinarily occur unless there was negligence. Johnson v. United States, 333 U.S. 46, 49-50 (1948); United States v. Nassau Marine Corp., 778 F.2d 1111, 1115 (5th Cir. 1985). Furthermore, in this Circuit proof of the doctrine does not create a presumption, but merely serves as a "form of circumstantial evidence that permits an inference to be drawn from a set of proven facts." Reber v. United States, 941 F.2d 975, 978 & n.1 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1675, (1992).

20. The facts of this case do not present a neat fit with the strict doctrine of res ipsa loquitur. As noted above, the court finds that Trans Pacific is not free of negligence. Furthermore, the cause of the accident, the anchor wire, was under the joint control of SSP and Smith-Rice, each of whom the court finds negligent. Finally, the cause of negligence in this case is not inexplicable. For example, the theory that the vessel was low in the water thus allowing its propeller to catch the anchor wire lying along the bottom is well within the realm of possibility, even though the court ultimately rejected that theory in the findings above. Therefore, the court concludes that res ipsa loquitur does not apply to the facts in this case.

21. Principles of comparative fault apply, United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975), and damages are to be apportioned according to the parties' comparative degrees of fault. Newby v. F/V Kristen Gail, 937 F.2d 1439, 1442 (9th Cir. 1991).

22. Based upon the foregoing the court finds that the percentage of fault attributable to each party is as follows:

Trans Pacific – 20%
Smith-Rice – 35%
SSP – 45%

23. Plaintiff is entitled to prejudgment interest from the date of loss. King Fisher Marine Service, Inc. v. N.P. Sunbonnet, 724 F.2d 1181, 1187 (5th Cir. 1984), reh'g denied, 729 F.2d 315 (5th Cir. 1984).

24. The rate of prejudgment interest is determined by the fifty-two week U.S. Treasury bill rate as of the date of the loss, which in this case is 7.01%. See Western Pacific Fisheries, Inc. v. S.S. President Grant, 730 F.2d 1280, 1289 (9th Cir. 1984).

25. Accordingly, defendant Smith-Rice is liable to plaintiff Trans Pacific in the amount of $62,320.15 plus prejudgment interest at the rate of 7.01%, or $22,299.83, for a total of $84,619.98 and defendant SSP is liable to plaintiff Trans Pacific in the amount of $80,125.91 plus prejudgment interest at the rate of 7.01%, or $28,671.20, for a total of $108,797.11.

IT IS SO ORDERED.

DATED: OCT 14 1992

MARILYN HALL PATEL

United States District Judge

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF OF RESPONDENTS, CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL., IN OPPOSITION

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I. THIS COURT HAS NEVER DECIDED THAT A DISTRICT COURT IS WITHOUT DISCRETION TO DENY AN APPLICATION FOR PREJUDGMENT INTEREST IN A MUTUAL FAULT ADMIRALTY CASE.

The respondents cite *The Manitoba*, 122 U.S. 97 (1887), in support of their argument that this Court need not hear this petition. The petitioner disagrees with respondents' argument that this Court's decision in *The Manitoba* is germane to the issue in this case, and further disagrees with certain conclusions drawn and statements made by the respondents concerning *The Manitoba*.

The Manitoba gives this Court no guidance on the issue the petitioner seeks to bring before the Court. Respondents state that *The Manitoba* decided that "an award of prejudgment interest in a collision involving mutual fault is proper." (Response p. 2)[1] Implicit in this statement is the conclusion that the Fifth and Eleventh Circuits' rule governing this matter is that an award of prejudgment interest in a collision involving mutual fault is *per se* improper. The rule in the Fifth and Eleventh Circuits, however, is not that an award of prejudgment interest in a collision case involving mutual fault is *per se* improper, but that the existence of mutual fault in a divided damages case constitutes a "peculiar circumstance," which permits the district court the discretion to either award or deny prejudgment interest, based upon

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[1] Respondents' brief is cited as "Response."

equitable considerations. The rule adopted by the Seventh, Ninth, and Sixth Circuits is that prejudgment interest must be awarded in collision cases involving mutual fault, irrespective of equitable considerations. The question of whether or not a district court has discretion to deny or award prejudgment interest in a collision case involving mutual fault was not decided in *The Manitoba*. The inclusion of prejudgment interest in the district court's calculation in *The Manitoba* was a decision within the district court's discretion and would remain so under the rule in effect in the Fifth and Eleventh Circuits.[2]

In respondents' description of *The Manitoba*, several references are made to the Manitoba as the vessel "least at fault" and the Comet as the vessel "to have the greater fault." (Response pp. 4-5) Respondents' description must be based upon respondents' own view of the facts described in the case, because there was no finding made in *The Manitoba* that either vessel was more at fault than the other. The holding of this Court in that case was simply that both vessels were at fault.

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[2] The inclusion of prejudgment interest in the district court's calculation of damages in *The Manitoba* was of no consequence because one-half of the total amount of damages without prejudgment interest was greater than the Manitoba's bond. The Comet and the Manitoba were found to be equally at fault for the collision of the two vessels. Comet sunk with her cargo and was a complete loss, which totaled $57,441.88. The Manitoba was damaged in the amount of $5,000. The Manitoba had given a $28,694.95 bond for release of The Manitoba. This Court found both vessels to be at fault and held that the total damages were to be divided, and awarded the Comet the full amount of the bond, which was less than half of the total damages.

Respondents' comments concerning this Court's holding in *The Maggie J. Smith*, 123 U.S. 349 (1887), obscures the significance of the point that in 1887, there was no requirement that interest be awarded on a bond in a limitation of liability proceeding unless the bond so provided. In *The Maggie J. Smith*, this Court approved of the rule that reserves to the district court the discretion to either award or deny interest on a bond. Although *The Maggie J. Smith* concerned interest on a bond posted in a limitation of liability proceeding, there is little conceptual difference between awarding prejudgment interest and awarding interest on a bond from the time the bond is given until liability and damages are decided.

II. THIS COURT'S DECISION IN *RELIABLE TRANSFER* DID NOT DECIDE THAT DISTRICT COURTS DO NOT HAVE THE DISCRETION TO DENY PREJUDGMENT INTEREST IN MUTUAL FAULT ADMIRALTY CASES.

Respondents argue that *United States v. Reliable Transfer*, 421 U.S. 397 (1975), read in conjunction with *West Virginia v. United States*, 479 U.S. 305 (1987), supports the conclusion that district courts do not have the discretion to deny prejudgment interest in mutual fault admiralty cases. In neither case, however, did this Court address the issue raised in this petition. Respondents concede that *Reliable Transfer* did not address mutual fault in the context of whether or not to award prejudgment interest. (Response p. 7) In *West Virginia v. United States*, this Court held that, under the longstanding federal common-law rule, parties owing debts to the federal government must pay prejudgment interest where the underlying claim is a

contractual obligation to pay money. Because this case is neither against the federal government nor involves a contractual obligation to pay money, it cannot logically be concluded that this Court's decision in *West Virginia v. United States*, read in conjunction with *Reliable Transfer*, somehow decided the issue in this case.

Neither *Reliable Transfer* nor *West Virginia v. United States* consider the concerns which compelled the Fifth and Eleventh Circuits to retain the rule which preserves the discretion of the district judge to deny prejudgment interest in a mutual fault collision case, when it would be inequitable to award prejudgment interest. *See, e.g., Dow Chemical Co. v. Dixie Carriers*, 463 F.2d 120 (5th Cir. 1972). Uncertainty as to liability, degree of fault, and amount of damages which exist in a mutual fault collision case and might result in making an award of prejudgment interest inequitable in a particular case, do not exist in a case based on a contract to pay a liquidated amount on a certain date. Although this Court in *West Virginia v. United States* rejected a balancing of equities approach, it did so in the context of a contract claim for a liquidated amount due on a date certain. A mutual fault collision case is not based on contract and does not involve a liquidated amount due on a date certain. Instead, the final result of a claim in a mutual fault collision case is often highly speculative, because of uncertainty as to fault, degree of fault, and damages. Application of the mechanical rule, favored by the Ninth, Sixth, and Seventh Circuits, can result, and has resulted in this case, in a punitive award of prejudgment interest against a prevailing party, simply because the prevailing party correctly decided to defend itself against a lawsuit brought against

it by the party primarily responsible for the collision. The unintended effect of the mechanical rule applied by the Seventh Circuit in this case is to severely punish the petitioner for successfully defending itself in the case brought against it. Denying prejudgment interest in this case and in similar cases does not deprive a party, who would ordinarily obtain interest on money that was due and owing, of money owed them, because whether or not money was due and owing, in what amount, and to whom cannot be determined until liability and damages are resolved.

Respondents' argument that the First, Second, Third and Eighth Circuits "explicitly or implicitly" held that mutual fault does not constitute a special circumstance justifying a denial of prejudgment interest is not supported by the case law. (Response p. 9) The cases cited by respondents from the First, Second, Third and Eighth Circuits are district court mutual fault collision cases where the district courts, in the exercise of their discretion, awarded prejudgment interest.[3]

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[3] *STARLIGHT I, Inc. v. Patriot Corp.*, No. 83-3783-Z, Slip Op. (D.C. Mass. 1985) (Response App. 6, 16); *Trans Pacific Shipping Co. v. Smith-Rice Co.*, 1992 U.S.Dist. LEXIS 16,017 (N.D. Cal. 1992) (Response App. 19, 35); *Granholm v. TFL Express*, 576 F.Supp. 435, 456 (S.D.N.Y. 1993); *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854, 876 (E.D. Pa. 1977); *Lone Star Industries v. Mays Towing Co.*, 725 F.Supp. 440, 445 (E.D. Mo. 1989), *rev'd on other grounds*, 927 F.2d 1453 (8th Cir. 1991).

III. DEGREE OF FAULT IS RELEVANT TO THE AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT ADMIRALTY CASE.

Respondents' argument that degree of fault of the party seeking interest is irrevelant ignores the reality that the consequence of ignoring fault is that the party who bears less fault, when the party bearing greater fault also suffered greater damages, must bear the greater weight of the cost of delay inherent in the litigation. Moreover, this cost shifting occurs in the context of litigation stemming from the action of the party bearing the greater fault.

The Fifth and Eleventh Circuits' rule recognizes that in certain cases, such as this case, it is inequitable to impose the cost of delay on a party bearing the lesser degree of fault, because to do so penalizes the lesser-at-fault party for legitimately defending its interests against the party bearing the greater degree of fault. To fully understand the injustice which occurred in this case, one must realize that if the respondents are eventually awarded all of the prejudgment interest which they seek, the petitioner would have been better off simply paying the respondents the $6.5 million dollars they demanded in their complaint, than defending itself in court, and proving that its fault is limited to 33 percent rather than 100 percent. Justice at the cost imposed by the mechanical rule adopted by the Seventh Circuit in this case cannot be afforded by anyone.

CONCLUSION

For these reasons and those stated in our petition, we respectfully request the Court to grant the petition.

Dated and signed at Milwaukee, Wisconsin this 14th day of December, 1994.

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FILED
FEB 21 1995

(4)

No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

vs.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

TERMED APPEAL

U.S. District Court
Eastern District of Wisconsin (Milwaukee)

CIVIL DOCKET FOR CASE #: 80-CV-1001

Filed: 10/29/80

Cement Div Natl Gyps v.
Milwaukee, City of
Assigned to: Judge Thomas J. Curran
Demand: $4,000 Nature of Suit: 340
Lead Docket: None Jurisdiction:
Dkt # in USCA : is Federal Question
:93- -02545

Cause: 28:1331 Fed. Question: Personal Injury

CEMENT DIVISION
NATIONAL GYPSUM
COMPANY
plaintiff

Harney B. Stover, Jr.
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v.

MILWAUKEE, CITY OF
defendant

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(414) 278-2601

EDWARD E. GILLEN
COMPANY
third-party defendant

DATE	NR.	PROCEEDINGS
10/29/80	1	Complaint filed; summons issued.
11/6/80	2	Marshal's return of service, S&C; City of Milwaukee (Mayor or Clerk-City Hall) served 11/3/80.
11/26/80	3	Stipulation and Order (RWW) that deft may have to and including December 12, 1980, in which to answer or otherwise respond to the complaint.
12/15/80	4	Stipulation and Order (RWW) that the time for the deft to answer or otherwise respond to the complaint is extended to and including January 15, 1981.
1/15/81	5	ANSWER and Counterclaim in Admiralty for the deft.
1/26/81	6	Third-Party Complaint in Admiralty, Summons issued.
1/26/81	7	Pltf's. answer to deft's. counterclaim.
1/29/81	8	Return of service of Third-Party summons; Edward E. Gillin Co. served 1/29/81.
2/13/81	9	Hearing on Status Report (RWW). Status report set for August 27, 1981, at 9:00 a.m.
3/16/81	10	Stipulation that the third-party deft; Great Lakes may have until March 20, 1981 to answer, respond or otherwise plead to pltf's complaint and to the third party complaint.

3/27/81	11	Stipulation and Order (RWW) extending time to answer third party complaint; 5/26/81.
6/10/81	12	ANSWER of third-party deft.
7/8/81	13	Stipulation and Order (RWW) that the time for third party deft. Edward E. Gillen Company to answer or otherwise plead to the third party complaint against it may be extended to and including 6/17/81.
8/26/81	14	Notice of Retainer of John W. McMurray for Edward E. Gillen Company.
8/27/81	15	Notice of Retainer of John W. McMurray and John W. Norris (additional attorneys) for third party deft. Edward E. Gillen Company.
9/24/81	16	Deft's request to inspect and to photograph the Steamer E.M. Ford [sic] her attorney.
10/1/81	17	Stipulation grating [sic] pltf an extension of time in which to file its answers and objections to third party deft's first set of interrogatories.
*9/16/81	18	Status Report (RWW); further status report set for 12/18/81.
12/9/81	19	Pltf's Motion for leave to serve and file an amended complaint with attached AMENDED COMPLAINT.

12/15/81	20	Third-Party Deft. Edward E. Gillen's notice to take the deposition of Patricia J. Gallagher on 12/22/81 at 10:00 A.M. in Alpena, Michigan, Robert L. Brissette on 12/22/81 at 1:00 P.M. in Bay City, Michigan, Clarence Zolnierek on 12/22/81 at 3:00 P.M. in Alpena, Michigan, Joseph Zolnierek on 12/22/81 at 3:30 P.M. in Alpena, Michigan, Richard Jenne on 12/22/81 at 4:00 P.M. in Cheboygen, Michigan, and James B. Sheridan (present address unknown) third assistant engineer on Steamer E.M. Ford on 12/24/79; on 12/22/81 at 4:30 P.M.
12/16/81	21	Status Report (RWW); a final pretrial conference is scheduled for 7/16/82.
12/23/81	22	Proposed amended complaint.
12/22/81	23	Pltf's. motion to restrict scope of depositions of witnesses already depsoes [sic].
12/22/81	24	Pltf's. brief in support of pltf's. motion to restrict depositions.
12/22/81	25	Pltf's. affidavit in support of pltf's. motion to restrict depositions.
1/5/82	26	ANSWER to amended complaint by 3rd-party deft. Edward E. Gillen Co.
1/5/82	27	Deft Gillen Co. brief in opposition to pltf's. motion to restrict discovery.
1/8/82	28	Stipulation and Order (RWW) for extension of time for pltf. to answer.
1/18/82	29	Decision and Order denying pltf's. motion to restrict discovery.

3/15/82	30	Third-Party Deft. (Edward E. Gillen Company) notice to take the deposition of Cement Division, National Gypsum Company on 4/22/82 at 9:00 A.M. in Milwaukee, Wisconsin.
3/15/82	31	Third-Party Deft. (Edward E. Gillen Company) notice to take the deposition of Michael MacDonald on 4/22/82 at 9:00 A.M. in Alpena, Michigan.
3/15/82	32	Third-Party Deft. (Edward E. Gillen Company) notice to take the depositions of the following people: James C. Sherman on 4/14/82 at 9:00 A.M. in Bay Village, Ohio; John T. Burke on 4/14/82 at 1:00 P.M. in Cleveland Heights, Ohio; Robert Bowes on 4/15/82 at 9:00 A.M. in Avon Lake, Ohio; Robert M. Sorensen on 4/15/82 at 1:00 P.M. in Fort Belvoir, Virginia.
3/16/82	33	Notice of dismissal of The Great Lakes Towing Company of deft. City of Milwaukee
4/12/82	34	Stipulation and Order (RWW) that David M. Quale, Esq., of Prosser, Wiedabach & Quale, S.C., hereby is substituted as attorney for third party deft. Edward E. Gillen Company, a corporation, in the place and stead of Arthur J. Vlasak, Esq. and Roger H. Weede, Esq. of deVires, Vlasak & Schallert, S.C.
4/30/82	35	Designation of experts filed by third-party deft. Edward E. Gillen Company.

5/21/82	36	ANSWERS to pltf's requests for admissions of facts and Genuiness of documents (SECOND SET).
6/3/82	37	Deft's designation of experts. (See list for details).
6/14/82	38	AMENDED ANSWER AND COUNTERCLAIM IN ADMIRALTY of deft and third party pltf. City of Milwaukee.
6/16/82	39	Amendment to designation of experts.
6/29/82	40	Stipulation of all parties to extend certain discovery deadlines and to postpone the final pretrial scheduled for 7/23/82.
8/2/82	41	Deposition of Lawrence Brissette taken in Traverse City Michigan on 6/8/82.
9/14/82	42	Pltfs' motion for order compelling answers to interrogatories to third party deft with brief attached.
9/21/82	43	Counsel's statement re pltfs' motion for order compelling answers to interrogatories to third party deft.
9/30/82	44	Third party deft. Edward E. Gillen Company's reply brief regarding discovery.
10/14/82	45	Third party deft. Gillen's notice to take deposition of Henry E. Mensing on 10/26/82 in Columbus, OH.
10/15/82	46	Deft. and third party pltf. and third party deft's motion for an order compelling physical inspection.
10/15/82	47	Counsels' statement concerning above motion.

10/25/82	48	Pltfs' response to reply brief of third party deft. on pltfs' motion for an order to compel answers to its interrogatories.
10/25/82	49	Stipulation of all parties as to the authenticity of certain documents produced by the Gillen Company during the week of 7/12/82.
10/29/82	50	Pltfs' answer opposing motion of deft. and third party deft. for an order compelling physical inspection.
11/5/82	51	Third party deft. Gillen Company's notice to take deposition of Mark Presper on 11/9/82 in Milwaukee, WI 53202
11/5/82	52	Third party deft. Gillen Company's notice to take deposition of Michael McDonnell on 11/9/82 in Milwaukee, WI.
11/5/82	53	Third party deft. Gillen Company's notice to take deposition of William B. Hoffman on 11/16/82 in Memphis, TN.
11/8/82	54	Third party deft. Gillen's motion for permission to file depositions and answers to interrogatories.
11/8/82	55	Third party deft. Gillen's reply brief.
11/10/82	56	Deft. City of Milwaukee's reply brief to motion to permit entry.
11/12/82	57	Third party deft. Gillen's motion for an order reopening discovery to allow the taking of depositions with statement of counsel.

11/12/82	58	Decision and Order (RWW) that the pltf., Cement Division, National Gypsum Company shall make the E.M. Ford available for inspection by the City of Milwaukee and Edward E. Gillen Company at a time mutually agreeable to all parties during the week of 11/15/82.
11/17/82	59	Pretrial report of counsel for all parties.
11/18/82	60	Pltfs' answer to motion of third party deft. Gillen for an order reopening discovery to allow the taking of depositions.
11/19/82	61	Final pretrial conference (RWW); court trial on 7/25/83 (est. 5 weeks).
11/29/82	62	General order (RWW) permitting filing of discovery matters.
11/30/82	63	Stipulation and order (RWW) extending discovery to 12/22/82.
12/6/82	64	Third party deft. Gillen's amended notice to take deposition of Mark Presper on 12/15/82 in Milwaukee, WI.
12/27/82	65	Motion of third party deft. Edward E. Gillen Co. for an order re-opening discovery due to newly discovered evidence with attached exhibits. REOPEN DISC.
1/3/83	66	Letter from atty. for the City of Milwaukee in favor of reopening of discovery as appeared in third party deft's motion.
1/3/83	67	Deft. City's supplemental list of witnesses.

12/30/82	68	Pltf's supplemental witness list.
1/3/83	69	Third party deft.'s supplemental list of witnesses.
1/6/83	70	ANSWER of Pltfs to motion of third party deft. Edward Gillen for an order reopening discovery
1/17/83	71	Reply of deft. to the answer of pltfs. to motion of third party deft. for an order reopening discovery.
1/17/83	72	Reply of third party deft. to the answer of pltf. to third party deft's motion for order reopening discovery.
1/20/83	73	Pltfs' answer to reply of deft. City of Milwaukee regarding motion of third party deft. for an order reopening discovery.
1/26/83	74	Supplemental reply of third party deft. Gillen regarding its motion for an order reopening discovery.
1/28/83	75	Pltf's response to supplemental reply of third-party deft. regarding its motion for an order reopening discovery.
2/25/83	76	Decision and order (RWW) granting third party deft. Gillen's motion to reopen discovery until 4/15/83 for the limited purpose of discovering matters addressed in the motion; by 5/15/83 each party shall submit to the court and opposing counsel a supplemental list of exhibits and witnesses which must be added to the final pretrial report as the result of the additional discovery permitted by this order.

3/1/83	77	Third party deft's notice to take deposition of Tom Goedwaagen on 3/10/83 in Cleveland, OH.
3/1/83	78	Third party deft's notice to take deposition of True LeMon on 3/14/83 in Glen Ellyn, IL
3/4/83	79	Third party deft. Gillen's second amended notice to take deposition of Tom Goedwaagen on 3/21/83 in Cleveland, OH.
3/9/83	80	Third party deft. Gillen's notice to take deposition of James C. Sherman on 3/22 in Cleveland, OH.
3/9/83	81	Third party deft. Gillen's notice to take deposition of present secretary of Great Lakes Protective Asso. on 3/21/83 in Cleveland, OH.
3/17/83	82	Pltfs' motion to quash notice of deposition of James C. Sherman. P-QUASH SUBP
3/17/83	83	City's brief in opposition to above motion.
3/17/83	84	Third party deft's brief in opposition to above motion.
3/21/83	85	Pltf's reply memorandum to above motion. (P-QUASH SUBP)
3/21/83	86	Pltf's application to add another witness to their witness list with related exhibits.
3/18/83	87	Conference call (RWW).

3/28/83	88	Third party deft. Gillen's notice to take deposition of the custodian of the record of General Telephone Company on 4/11/83 in Muskegon, MI.
3/31/83	89	Transcript of 3/18/83 proceedings.
4/25/83	90	Pltf's notice of taking deposition of Lt. E. Scott Varney, NOAA, on May 4, 1983 in Rockville, Maryland.
5/6/83	91	Pltf's notice of deposition of Lt. E. Scott Varney, NOAA, on May 19, 1983 in Rockville, Maryland.
5/12/83	92	Pltfs' notice to take deposition of Ralph Biggs on 5/17/83 in Erie, PA.
5/12/83	93	Pltfs' notice to take deposition of Charles Arnold on 5/17/83 in Erie, PA.
5/12/83	94	Pltfs' notice to take deposition of Lt. E. Scott Varney on 5/24/83 in Rockville, MD.
5/16/83	95	Deft's supplement to pretrial order.
5/16/83	96	Pltfs' motion to quash notice of deposition of Great Lakes with attached brief and affidavit. P-QUASH NOT DEP
5/16/83	97	Third party deft's second supplement to pretrial order.
5/16/83	98	Deft's addition to supplement the pretrial order.
5/16/83	99	Pltfs' supplemental pretrial report.

5/20/83	100	Deft's motion for an order allowing amendment of the notice of deposition of Great Lakes Protective Association. D-AMEND NOT DEP (ORIGINAL IN JUDGE'S FILE).
5/20/83	101	Brief in support of above motion and in opposition to pltfs' motion to quash notice of deposition of Great Lakes. (ORIGINAL IN JUDGE'S FILE).
5/23/83	102	Addition to pltfs' supplemental pretrial report.
5/26/83	103	Pltf's answer in support of motion to quash notice of deposition of GLPA and opposing motion to amend said notice.
6/6/83	104	Decision and order (RWW) granting pltfs' motion to quash and denying the City's motion for leave to amend its notice of deposition insofar as the notice requires deponent Hanninen to appear for a deposition in Milwaukee; the court grants leave for the City to depose Mr. Hanninen in Cleveland, but only with respect to the limited matters set forth at the bottom of page 8 of the City's supporting brief.
6/17/83	105	Conference call (RWW); court trial on 5/1/84 (est. 22 days).
7/14/83	106	Conference call (RWW).
7/22/83	107	Protective order (RWW) (see order for details).
8/1/83	108	Third party deft. Gillen's third supplement to pretrial order.

8/15/83	109	Pltfs' response to Gillen's third supplement to pretrial order.
8/25/83	110	Deft and Third Party Deft.'s Notice to take the deposition of Arthur Sullivan on 9/7/83 at 2:00 P.M. in Chicago, Illinois.
8/31/83	111	Pltfs' motion to quash notice of deposition of Arthur Sullivan. P-QUASH DEPO
9/1/83	112	Deft's response to pltfs' motion to quash deposition of Arthur Sullivan.
9/6/83	113	Third party deft. Gillen's submissions in relation to deposition of Arthur Sullivan.
9/12/83	114	DECISION AND ORDER (RWW) granting pltf.'s motion to quash the notice of deposition of Arthur Sullivan.
9/2/83*	115	HEARING (RWW) – conference call; court will take motion under advisement.
9/14/83	116	Pltf.'s reply brief in support of motion to quash and response to defendant city's motion for leave to amend pretrial order.
9/15/83	117	Submissions of third-party deft. Edward Gillen Co. in relation to the deposition of Arthur Sullivan.
9/16/83	118	Deft. Edward E. Gillen Co.'s letter withdrawing motion concerning its request to add the name of Arthur Sullivan to its witness list.

9/16/83	119	Letter from City of Milwaukee regarding pltfs' reply brief in support of motion to quash, etc.
10/3/83	120	Pltfs' request for leave to amend pltfs' supplemental pretrial report.
10/18/83	121	Deft's motion to disqualify counsel John H. Hanninen & his firm.
10/18/83	122	Brief in support of above motion.
10/18/83	123	Deposition of John H. Hanninen taken on 7/14/83. (IN JUDGE'S FILE).
10/19/83	124	Deposition of Robert F. Gilbert taken on 3/22/82. (IN JUDGE'S FILE).
11/3/83	125	Pltfs' brief opposing deft's motion to disqualify counsel.
11/15/83	126	Deposition of Thomas Goedewaagen taken on Monday March 21, 1983 at 5:20 p.m. in Ohio. (In Judges File)
11/15/83	127	Continued Deposition of Thomas Goedewaagen taken on Wednesday April 6, 1983 called by the third Party Deft. at 9:40 A.M. in Ohio. (In Judges File)
11/15/83	128	Deposition of True LeMon taken on April 6, 1983 at 12:00 P.M. in Ohio. (Judges)
11/16/83	129	Deft's reply brief in support of its motion to disqualify counsel.
11/28/83	130	Pltfs' supplemental brief opposing motion of deft. City of Milwaukee to disqualify counsel.

11/29/83	131	Deft's motion to strike supplemental brief on pltfs.
12/1/83	132	Third party deft's objections to statements by pltfs. in supplementary brief relating to motion to disqualify counsel.
12/19/83	133	Deft's supplemental memorandum supporting motion to disqualify counsel.
2/1/84	134	City of Milwaukee's Supplement to Pretrial Order.
2/14/84	135	Plaintiffs' Report to the Court on the inability of the parties to Stipulate the testimony of John Hanninen.
2/14/84	136	Letter from Assistant City Attorney Gregg Gunta (copy) to Mr. Spotts.
2/14/84	137	Letter from Gregg Gunta requesting that the court review the briefs & support papers of the parties regarding the motion to disqualify & render a decision on this matter.
2/14/84	138	Letter from Assistant City Attorney, Gregg Gunta requesting the Court disregarding this document & consider the City's motion based merely upon the briefs heretofore submitted to the court.
3/14/84	139	Plaintiffs' Response to the City of Milwaukee's Supplement to Pre-trial Order dated 1/30/84.
7/23/84	140	Defendant & Third Party Plaintiff City of Milwaukee's MOTION to Substitute Expert Witness.
7/23/84	141	Memorandum in support of Motion to Substitute Expert Witness

12/19/84	142	Decision and ORDER (TJC) that pltf's request to amend pretrial report is granted that deft's motion to disqualify counsel is granted; that deft's motion to strike pltf's supplemental brief is denied and that deft's motion to substitute experts is granted.
01/02/85	143	Pltf's motion to vacate, alter or amend order of 12/19/84 and for additional findings with attached supporting brief.
01/02/85	144	Deposition of James C. Sherman taken on 4/6/83. (In Judge's file)
01/02/85	145	Deposition of Thomas Goedewaagen taken on 4/6/83. (In Judge's file)
01/02/85	146	Deposition of True LeMon taken on 4/6/83. (In Judge's file)
01/02/85	147	Deposition of Thomas Goedewaagen taken on 3/21/83. (In Judge's file)
01/02/85	148	Statement of claim on underwriters. (In Judge's file)
01/15/85	149	ORDER (TJC) that pltf's motion to vacate, alter or amend the court's order of 12/19/84 is denied.
01/15/85	150	Pltfs' Notice of Appeal to the 7th Circuit from the Order disqualifying counsel entered 12/19/84
01/16/85	151	Pltfs' Notice of Appeal to the 7th Circuit from the Order disqualifying counsel entered 12/19/84 ***and*** from the Order denying pltfs' motion to vacate, alter or amend order and for additional findings entered 1/15/85

01/17/85		Short record (including both Notices of Appeal) to the 7th Circuit – copies to all parties
01/21/85	152	Notice of change of address and firm name of John W. McMurray and John W. Norris.
01/23/85	153	Letter from 3rd-party pltf designating certain items for the record on appeal (copy of docket sheet attached highlighting items designated)
01/24/85	154	Pltf's motion to stay further proceedings pending appeal.
01/24/85	155	Pltf's brief in support of above motion.
01/24/85	156	Pltf's motion to stay operation of disqualification pending appeal.
01/24/85	157	Pltf's brief in support of above motion.
01/25/85	158	Pltf's letter designating certain items for the record on appeal (copy of docket sheet attached indicating items designated)
02/01/85	159	Gillen Co.'s response to pltf's motion to stay proceedings during appeal.
02/06/85	160	Deft. City of Milwaukee's letter advising that they do not oppose the pending motions to stay proceeding pending appeal.
02/05/85	161	ORDER (TJC) denying pltf's motions for stay pending appeal.
02/11/85	162	Scheduling status conference; FPT set for 12/19/85; court trial dates set as follows: 1/6/86, 9/2/86, 1/5/87 and 3/7/88.

02/15/85	163	Gillen Company's fourth supplemental pretrial report.
02/21/85	164	ORDER (TJC) following scheduling conference; see dates of 02/11/85.
09/06/85	165	Certified copy of order from Seventh Circuit; the motion for an order dismissing the appeal is granted and this appeal is dismissed for lack of jurisdiction; further, that appellant's request for a writ of mandamus or an order requiring certification by the district court is denied.
12/16/85	166	Third party deft's trial brief.
12/16/85	167	Third party deft's version of disputed facts.
12/16/85	168	Pretrial report.
12/16/85	169	Pltf's statement of facts and brief of applicable law.
12/16/85	170	Deft. and third party pltf. City of Milwaukee's brief re: duties of a master and a wharfinger.
12/16/85	171	Deft. and third party pltf's statement of disputed facts.
12/18/85	172	Deft. and third party pltf. and third party deft's motion to strike pltf's "Statement of Facts and Discussion of Applicable Law" filed on 12/16/85.
12/19/85	173	FINAL PRETRIAL CONFERENCE (TJC).
12/23/85	174	Supplemental pretrial report.
01/09/86	175	Trial Memorandum.

01/10/86	176	Deft's trial brief re: admissibility of 1984 U.S. Coast Pilot Provisions.
01/24/86	177	COURT TRIAL (TJC) commencing on 01/06/86 and concluding on 01/24/86; post trial briefing schedule set by court.
01/28/86	178	Deft's letter brief re: Exhibits 596 and 615.
02/12/86	179	ORDER (TJC); DISMISSING all claims against 3rd party-deft. Edward G. Gillen Co. nunc pro tunc 1/8/86. EOD 2/14/86
02/28/86	180	Pltf's post trial brief.
03/03/86	181	Deft's post trial brief.
03/21/86	182	Deft's response to pltf's post trial brief.
03/21/86	183	Pltf's response to deft's post trial brief.
06/30/89	184	DECISION & ORDER (TJC) by agreement of the parties and order of the court, only the liability issues were tried before the court during the first phase of this bifurcated trial; consequently, the court has made no determination of damages; accordingly, the court ORDERS that, within 30 days of the date of this Decision and Order, Cement Division and the city of Milwaukee shall file a stipulation of damages; failing this, a second phase of this trial will be scheduled to determine damages. Copy mailed to parties. E.O.D. 7/5/89.
07/13/89	185	Plaintiff's motion for enlargement of time.
07/13/89	186	Affidavit of Harney B. Stover.

07/17/89	187	Order (TJC); parties shall comply with the Court's order of 6/20/89 and if necessary, trial of this matter will commence at 9:30 a.m. on 10/16/89.
07/28/89	188	Pltf's Notice of Appeal to the 7th Circuit Court of Appeals from orders entered 6/30/89, 12/19/84, 1/15/85.
07/31/89		Short record mailed, copies to counsel.
08/18/89	189	Plaintiff's motion for stay of proceedings pending outcome of appeal.
08/23/89	190	Order (TJC); the plaintiffs' motion for stay pending outcome of appeal is granted. The Clerk of Court is instructed to close this case for statistical purposes. EOD 8/25/89.
09/07/89	191	Index to transcript of trial testimony
09/07/89	192	Trial transcript dated 1/6 & 7, 1986, Vol. I
09/07/89	193	Trial transcript dated 1/8/86, Vol. II.
09/07/89	194	Trial transcript dated 1/10/86, Vol. III.
09/07/89	195	Trial transcript dated 1/14/86, Vol. IV.
09/07/89	196	Trial transcript dated 1/14/86, Vol. V.
09/07/89	197	Trial transcript dated 1/16/86, Vol. VI
09/07/89	198	Trial transcript dated 1/21/86, Vol. VII
09/07/89	199	Trial transcript dated 1/23/86, Vol. VIII.

09/15/89		Record on appeal #89-2631 mailed to the 7th Circuit Court of Appeals consisting of 4 bound volumes pleadings, 10 volumes transcripts, 10 volumes depositions, 6 loose volumes pleadings, 4 boxes of exhibits - CERTIFICATE OF CLERK.
01/30/90		Contents of record returned from Court of Appeals 4 vol. pleadings 10 vol. transcripts 10 vol. depositions 6 vol. loose pleadings 3 boxes exhibits - 2 black binders (entire record)
01/30/90	200	Certified copy of order from U.S. Court of Appeals; the petition for rehearing is denied.
01/30/90	201	Bill of Costs taxed by Court of Appeals; costs taxed in favor of Cement Division in the sum of $1,166.89.

ICMS

Proceedings include all events. TERMED
2:80cv1001 Cement Div Natl Gyps APPEAL
v. Milwaukee, City of

6/30/89	184	DECISION AND ORDER: by Judge Thomas J. Curran dismissing case (cc: all counsel) (eeb) [Entry date 12/21/92]
12/14/92	202	ORDER by Judge Thomas J. Curran Case reopened Status conference set for 12/17/92. (cc: all counsel) (eeb) [Entry date 12/21/92] [Edit date 12/21/92]

12/17/92	203	HEARING MINUTES: Stipulation for interlocutory judgment to be filed. (eeb) [Entry date 12/21/92]
12/17/92	204	ORDER by Judge Thomas J. Curran: IT IS ORDERED that a statement of stipulated facts be submitted and filed with the court on or before 1/5/93/ IT IS FURTHERED ORDERED that joint briefs in support of their respective positions will be submitted by the parties on or before 2/2/93 and simultaneous reply briefs will be filed with the court on or before 2/16/93. (cc: all counsel) (eeb) [Entry date 12/21/92]
12/17/92	205	STIPULATION and ORDER by Judge Thomas J. Curran: That an interlocutory partial judgment be and the same hereby is entered in accordance with the above and foregoing stipulation effective 12/4/92. (cc: all counsel) (eeb) [Entry date 12/21/92]
12/17/92	206	SATISFACTION OF INTERLOCUTORY PARTIAL JUDGMENT. (eeb) [Entry date 12/21/92]
1/5/93	207	AGREED STATEMENT of post-casualty facts. (amb)
1/28/93	208	STIPULATION and ORDER for extension of time by Judge Thomas J. Curran: (cc: all counsel) (bjp) [Entry date 02/01/93]
3/1/93	209	BRIEF FILED by plaintiff Cement Div Natl Gyps on issue of prejudgment interest (bjp)

3/1/93	210	BRIEF by defendant Milwaukee, City of in opposition to the awarding of prejudgment interest (ajf) [Entry date 03/02/93]
4/1/93	211	REPLY brief in opposition to the awarding of prejudgment interest by defendant Milwaukee, City of (bjp) [Entry date 04/02/93]
4/1/93	212	REPLY brief on issue of prejudgment interest by plaintiff Cement Div Natl Gyps (bjp) [Entry date 04/02/93]
5/28/93	213	ORDER that the plaintiffs' request for prejudgment interest on the amount paid in settlement by the defendant is denied. All of the issues in this case having been resolved, this action is dismissed upon its merits. The Clerk shall enter a final judgment by Judge Thomas J. Curran (cc: all counsel) (bjp) [Entry date 06/02/93]
5/28/93	214	JUDGMENT: the City of Milwaukee is not liable to the plaintiff for payment of prejudgment interest on the amount paid in settlement – deputy clerk terminating case (cc: all counsel) (bjp) [Entry date 06/01/93]
6/24/93	215	NOTICE OF APPEAL by plaintiff from Dist. Court decision [214-2], [213-1] (cc: all counsel) (sln)
6/24/93	216	JURISDICTIONAL STATEMENT by plaintiff (cc: all counsel) (sln)
6/24/93	–	RECEIVED re [215-1] fee in amount of $ 105 (Receipt #65464) (sln)

6/24/93	–	SHORT RECORD Transmitted to USCA (cc: all counsel) (sln)
2/14/94	–	RECORD on Appeal sent to 7th Circuit Court of Appeals, USCA 93-2545, re [215-1], consisting of 4 vol pleadings, 10 transcripts (Nos. 89, 191-199), 4 boxes of exhibits, 6 loose pleadings (nos. 96, 101, 59, 148, 168, and 184 (cc: all counsel) (amb)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Plaintiffs,

vs.

CITY OF MILWAUKEE,

Defendant and
Third-Party Plaintiff,

vs.

EDWARD E. GILLEN COMPANY,

Third-Party Defendant.

Case No. 80-C-1001

Judge Thomas J. Curran

(Filed January 5, 1993)

AGREED STATEMENT OF POST-CASUALTY FACTS

Introduction

This Agreed Statement of Post-Casualty Facts sets forth in a simple and direct manner the litigation history of the case which has been pending in the United States District Court for the Eastern District of Wisconsin and/or the United States Court of Appeals for the Seventh Circuit for over twelve years. The purpose of the Agreed Statement is to establish a basis for the parties to submit to the District Court the issue of prejudgment interest which is the only outstanding issue in the case that remains unsettled and contested. The Agreed Statement does not limit the facts to which the parties may refer in their arguments or to which the Court may refer in its

decision, but only assists in providing focus and order to the briefing and decision. In order to accomplish this goal, the Agreed Statement will list by year the key events (primarily litigation events) in the case.

In this Agreed Statement, reference to the various parties will be abbreviated in order to clarify and simplify the statement. The plaintiff, Cement Division, National Gypsum Co., will be referred to as "National Gypsum" or in some instances "Huron Cement." The defendant, City of Milwaukee, will be referred to as the "City." Third-party defendants in the litigation, i.e., Edward E. Gillen Company and Great Lakes Towing Company, will be referred to as "Gillen" and "Great Lakes Towing" respectively.

1979

On December 24, the S/S EM FORD, loaded with 5,800 tons of bulk cement, was moored in a City-owned slip in Milwaukee's outer harbor. In the course of a severe northeasterly storm, the FORD, over an eighteen-hour period, broke loose from its moorings, battered against the headwall of the slip, tore holes in its hull, took on water and sank to the bottom of the slip. The FORD was subsequently raised and repaired at a cost of $6,175,209.25. The value of the lost cement cargo was $319,000.00. The cost of repairs to the City's dock and headwall was $192,432.18.

1980

On October 29, the owner of the vessel, National Gypsum, brought this suit in admiralty pursuant to 28 U.S.C. sec. 1333 against the City seeking $4.5 million in damages. The suit alleged, among other things, that the City had negligently breached its duty as a wharfinger by failing to warn National Gypsum of a hidden danger in the berthing slip and by misrepresenting conditions which could occur within the slip during a storm. The case was assigned to U.S. District Judge Robert W. Warren.

1981

On January 15, the City denied fault and alleged in a counterclaim that National Gypsum was negligent in leaving the FORD moored in an outer harbor slip in winter virtually unmanned, with no means aboard of monitoring weather or summoning tugs or a pilot for assistance. The City sought to recover $250,000 for damages caused by the vessel crashing against the City's docks and headwall. Later that month, the City served a third-party complaint on Great Lakes Towing and Gillen, alleging that their negligence caused or contributed to the casualty.

On April 8, National Gypsum commenced discovery when it served upon the City its first set of interrogatories and requests for production of documents. In addition to the interrogatories and requests for production submitted and made by the various parties, the following depositions were taken in 1981:

At the Behest of the City:

Robert L. Brissette	First Mate-EM Ford	7/16/81
Patrick J. Gallagher	Master-EM Ford	7/16/81
William Rudzik	Electrical Engineer Uihlein Electric, involved in mooringof EM Ford on December 11, 1979	12/15/81
Lt. Randall	Parmentier Performed Coast Guard investigation of sinking	12/15/81
William Wade	Surveyor and Independent Consultant for Gillen	12/16/81
Salvatore Gumina	Foreman for Gillen	12/16/81
Capt. Thomas Parks	Temporary Master of EM Ford on 12/24/79	12/17/81
Robert F. MacLaren	Tugboat Captain for Great Lakes Towing	12/17/81
Donald Jackson	Executive Vice President of Gillen	12/17/81
Jack Bohl	Tugboat Captain for Great Lakes Towing	12/17/81

At the Behest of National Gypsum:

Stanley Blawas	Dock Superintendent, Port of Milwaukee	9/15/81
Wright B. Garvey	Harbor Master, City of Milwaukee	9/15/81
Beverly Strike	Adm. Assistant, Port of Milwaukee	9/15/81

Earl Anderson	Harbor Engineer, City of Milwaukee	9/16/81
James Haskell	Deputy Port Director, Port of Milwaukee	9/16/81
Admiral Roy Hoffman	Port Director, Port of Milwaukee	9/16/81

At the Behest of Gillen:

James W. Gaskell	Superintendent of Vessels for Huron Cement	10/7/81
Eugene P. Stafford	Fleet Captain for Huron Cement	10/7/81
Norman Martinson	Fleet Engineer for Huron Cement	10/7/81
Walter Heckl	Employee of Advance Boiler Co. in Milwaukee	12/15/81

In December, National Gypsum filed an amended complaint to include all of the vessel and cargo insurers as parties plaintiff and to increase the claim for damages to $6.5 million.

1982

On March 16, Great Lakes Towing was dismissed from the case. On June 14, the City filed an amended answer and counterclaim. On July 1, the parties stipulated to extend certain discovery deadlines and to postpone the final pretrial conference previously scheduled for July 23, 1982. On June 16, all parties stipulated to completing discovery by October 15, 1982, and having a final pretrial conference prior to November 1, 1982.

On November 12, Gillen moved the court for an order reopening discovery. On November 30, discovery was extended by stipulation and order to December 22, 1982. On November 19, the court ordered all updated witness lists to be filed by January 3, 1983, and scheduled a five-week trial to the court to commence on July 25, 1983.

During 1982, the following depositions were taken:

At the Behest of Gillen:

Clarence Zolnierek	Second Mate aboard EM Ford 12/79	1/20/82
Joseph Zolnierek	First Assistant Engineer aboard EM Ford 12/79	1/20/82
Robert J. Malaski	An Oiler aboard EM Ford 12/24/79	1/21/82
James B. Sheridan	Third Engineer aboard EM Ford 12/24/79	1/21/82
Robert L. Brissette	First Mate EM Ford	1/22/82
Patrick J. Gallagher	Master of EM Ford	1/22/82
John T. Burke	Plaintiffs' Expert on Questions Rel. to Masters of Vessels	4/14/82
James C. Sherman	Surveyor for U.S. Salvage Assn. and Plaintiffs' Expert	4/14/82
Robert Francis Bowes	Plaintiffs' Weather Expert	4/15/82
Edward J. Price	Director of Governmental & Public Affairs for Huron Cement	4/28/82

Robert M. Sorenson	Plaintiff's Expert re wave action through gap in breakwall	5/4/82
Henry E. Mensing	Vice President of Operations, Huron Cement 1979	10/26/82
William B. Hoffman	President of Huron Cement at time of sinking	12/8/82
John M. McDonnell	Director of Distribution for Huron Cement, 1979	12/8/82

At the Behest of the City:

Richard Jenne	Able Seaman and Wheelsman aboard EM Ford 12/79	1/20/82
Robert F. Gilbert	Secretary of Great Lakes Protective Association	3/22/82
Nicholas Kadinger	Employee of construction company that repaired the bollards on Slip No. 1	4/21/82
Andrew La Borde	Great Lakes marine buff; took photos of EM Ford breaking away on 12/24/79	4/21/82
Paul Wiening	Great Lakes marine buff; took photos of EM Ford breaking away on 12/24/79	4/21/82
Roger Berg	Employee of company that repaired bollards at Slip No. 1	4/21/82

At the Behest of National Gypsum:

Keith Iverson	Employee of Gillen involved in events on Jones Island 12/24/79	4/28/82
Francis Nakles	Foreman for Gillen involved in events of 12/24/79	4/28/82
John Running	Superintendent of Gillen's Becher St. Yard involved in events of 12/24/79	4/28/82
Michael Schmidt	Laborer for Gillen involved in events of 12/24/79	4/28/82
Joseph Lundeen	Foreman for Gillen involved in events of Jones Island 12/24/79	4/28/82
Adalore Pare	Pile Driver for Gillen	4/29/82
Terry Pare	Laborer, Gillen	4/29/82
Stanley Catarozoli	Employee of Gillen who worked aboard the EM Ford	7/15/82
Mark Rhyner	Field Engineer for Gillen involved in events of 12/24/79	7/15/82
Andrew Jackson	Chairman of the Board of Directors of Gillen	12/15/82
Gary Jackson	Executive Vice President, Gillen 12/79	12/15/82

Statement Taken

Kenneth W. Kutz	(Statement taken - no deposition) Security Guard for Port of Milw.	6/7/82

1983

On February 25, the court granted Gillen's motion that discovery be reopened until April 15, 1983. The court ordered that exhibit and witness lists be filed by May 15, 1983. On June 17, the trial was rescheduled to May 1, 1984 to conclude May 31, 1984. On October 18, the City filed its motion to disqualify lead counsel for National Gypsum. After briefing and supplemental briefing, the motion was finally at issue before the Court as of December 19, 1983.

In 1983 the following depositions were taken:

At the Behest of Gillen:

Thomas Goedwaagen	Surveyor for U.S. Salvage Assn. in Cleveland	3/21/83 and 4/6/83
Robert F. Gilbert	Secretary of Great Lakes Protective Association	3/22/83
True LeMon	Surveyor for U.S. Salvage Assn. in Chicago	4/6/83
James C. Sherman	Surveyor for U.S. Salvage Assn. and Plaintiffs' Expert	4/6/83

At the Behest of National Gypsum:

Charles Arnold	Official of Litton Industries, owner of "Presque Isle"	5/17/83
Ralph Biggs	Official of Litton Industries, owner of "Presque Isle"	5/17/83
Lt. E. Scott Varney	Official of NOAA responsible for updating "U.S. Coast Pilot"	5/24/83

At the Behest of the City:

John H. Hanninen	Lead Counsel of Plaintiffs and attorney-in-fact for Great Lakes Protective Association.	7/14/83

1984

On January 25, the case was transferred, at the instance of the Court, from Judge Warren to Judge Thomas J. Curran and on December 19 the court granted the City's motion to disqualify counsel for National Gypsum.

1985

On January 15, National Gypsum filed a notice of appeal from the order disqualifying counsel, and several days later National Gypsum moved to stay further proceedings in the trial court pending the outcome of the appeal of the disqualification order.

On February 5, the court denied the motion to stay proceedings in the District Court. Several days later National Gypsum moved the United States Court of Appeals for the Seventh Circuit for an order to stay proceedings in the trial court and to stay the effective disqualification order to allow counsel to appear on appeal.

On February 11 the District Court scheduled the case for trial on January 6, 1986 as the fourth civil case on its calendar.

On May 15, the Court of Appeals denied the motion to stay proceedings in the District Court, but allowed disqualified counsel to participate in the appeal.

On June 11, the City moved to dismiss the appeal pending in the Seventh Circuit, because of a U.S. Supreme Court decision just rendered, and on August 6 the Court of Appeals granted the City's motion to dismiss.

On September 3 the court informed the parties that the trial scheduled for January 6, 1986 was now the number one case on the civil trial calendar. A Final Pretrial Conference was held by the Court on December 19.

1986

The trial of this case commenced on January 6, 1986 and concluded on January 24, 1986. Because the trial was bifurcated, the liability issue was tried first to the District Court without a jury. Gillen settled with National Gypsum and was dismissed from the case effective January 8.

On March 3 the parties filed their post-trial briefs and on March 21 their post-trial responsive briefs. Decision was pending for the balance of the year.

1987

Decision pending.

1988

Decision pending.

1989

On June 30, 1989, the District Court issued its decision. Based upon its findings, the District Court held both National Gypsum and the City to have been negligent and held National Gypsum 96 percent at fault and the City 4 percent at fault.

The court in its decision ordered the parties to file a stipulation of damages within thirty days.

On July 28, National Gypsum appealed the decisions of the District Court on liability and disqualification of counsel to the United States Court of Appeals for the Seventh Circuit.

On August 18, National Gypsum moved the District Court to stay proceedings pending the outcome of the appeal. This motion was granted on August 23.

On August 21, National Gypsum moved for an extension of time to file its brief, and on August 25, the Court of Appeals issued a briefing schedule which required National Gypsum to file its brief on November 1, 1989,

the City to respond by December 1, 1989, and National Gypsum to reply by December 15, 1989. On August 25, the City moved the Court of Appeals to extend the time to file its responsive brief which the court granted on November 1 and ordered that the City's responsive brief was due on January 15, 1990.

On November 20, the City moved to dismiss the appeal of the District Court's order of disqualification of counsel.

1990

On January 16, the Court of Appeals informed the parties that the motion to dismiss the disqualification order had been referred to the Merits Panel.

On January 17, National Gypsum moved the court for an order extending the time in which to file its reply brief, which the court granted and ordered that the reply brief be filed by January 21, 1990.

Oral argument in the case was had on April 13.

On October 16, 1990, the United States Court of Appeals for the Seventh Circuit held that the District Court's apportionment of fault was clearly erroneous and reapportioned fault two-thirds upon National Gypsum and one-third upon the City. The Court also found that it lacked jurisdiction, at that time, to review the trial court's disqualification order.

On October 30, the City filed a Petition for Rehearing with Suggestion for Rehearing *en banc*, which the Court of Appeals denied on November 21, 1990.

1991

On February 14, 1991, the City filed a Petition for a Writ of Certiorari in the Supreme Court of the United States to review the decision of the United Stated Court of Appeals for the Seventh Circuit. Specifically, the Court was asked to review the following two questions:

> 1. Does a federal court of appeals, which has found an apportionment of fault by a district court to be clearly erroneous under Fed. R. Civ. P. 52(a), have the authority to make new findings of facts, reweigh the evidence and reapportion fault?
>
> 2. Should the admiralty rule that liability for damages is to be allocated among the parties proportionately to the degree of their fault be changed so that the relative cost of avoiding the casualty becomes a substantial factor in apportioning fault?

On March 18, National Gypsum filed its response to the petition.

On April 15, the Supreme Court denied the petition.

Shortly thereafter, National Gypsum and the City began negotiations to attempt to arrive at a stipulation of damages.

On December 5, the City's surveyor and National Gypsum's surveyors came to an agreement with reference to certain major aspects of the damages claim.

1992

On June 14, counsel for National Gypsum and the City Attorney's Office agreed to recommend settlement of the Plaintiffs' damage claim for $1,677,541.86, excluding the issue of prejudgment interest, which was to be submitted to the District Court for a decision.

On June 28, the Common Council of the City of Milwaukee approved the settlement as proposed. A few days earlier National Gypsum and its insurers had approved and authorized the proposed settlement.

The manner in which the stipulation of damages was arrived at is described in the memo attached hereto entitled "Analysis of the Damage Claim of the EM Ford's Owners and Underwriters."

On December 4, the City paid National Gypsum and its insurers $1,677,541.86 in settlement of their case, excluding their claim for prejudgment interest which is to be submitted to the District Court for decision.

Dated at Milwaukee, Wisconsin this 5th day of January, 1993.

/s/ Harney B. Stover, Jr.
Harney B. Stover, Jr., Esq.
WI 346701 GC
DAVIS & KUELTHAU, S.C.
111 East Kilbourn, #1400
Milwaukee, WI 53202
Tel: (414) 276-0200
Atty. for Plaintiffs

/s/ Rudolph M. Konrad
Grant F. Langley, City Attorney
Rudolph M. Konrad, Deputy City Atty.
City of Milwaukee
200 East Wells Street, #800
Milwaukee, WI 53202
Tel: (414) 278-2601
Attys. for Defendant, City of Milwaukee

ANALYSIS OF THE DAMAGE CLAIM OF THE E.M. FORD'S OWNERS AND UNDERWRITERS

The damage claim of the E.M. Ford's owners and underwriters can be categorized as follows: (1) repair costs, (2) survey costs, (3) cargo loss, and (4) losses to the owner not covered by insurance. [Page references are to Statement of Claim of Underwriters, June 16, 1981, unless otherwise indicated.]

1. Repair Costs

The cost of repairs to the Ford was $5,790,397.44. [p. 191] Of this amount, $5,785,397.44 was paid by the

underwriters and $5,000.00 was paid by the owners. (The $5,000 was a "deductible" under the policy.) [p. 193]

It has been agreed by the surveyors for the ship and the City that the total cost of repair, $1,057,565.44 was of no financial benefit to the owner, i.e., refloating the vessel, cargo removal, temporary repairs, preliminary submersion treatment, etc.; but that the balance of the repairs, which were permanent and cost $4,732,832.00, would benefit the owner by reducing future maintenance costs. The City and the ship disagree as to the amount of the benefit. The City maintains that the benefit is equal to 19% of the cost of the repairs, while the ship maintains that it is equal to 11.5%. [See surveyors' memo of December 5, 1991]

In addition, the City maintains that the permanent repairs increased the value of the Ford by an amount equal to 15%, while the ship maintains there was no increase in the value of the vessel. [See surveyors' memo] The following are the calculations based upon the parties' respective positions:

Ship's Portion		Damages	City's Portion
$4,732,832.00	a.	Gross repairs of Benefit to Owner	$4,732,832.00
-544,275.68	b.	Less 11.5% (ship's opinion)	
	c.	Less 19% (City's opinion)	-899,238.08
			$3,833,593.92

	d. Less add'l 15% (City's opinion)	-709,924.80
$4,188,556.32	e. Net Repairs of Benefit to Owner	$3,123,669.12

Difference between the two positions is $1,064,887.20. The ship and the City have agreed to compromise this difference by one-half, making the net repairs of benefit to the owner $3,656,112.72. [3,123,669.12 + (1,064,887.20 - 2) = 3,656,112.72]. Of this amount, the City is liable to pay one-third or $1,218,704.24.

In addition, the City is required to pay one-third of the repair costs that were of no benefit to the owner ($1,057,565.44), which is $352,521.81.

The liability of the City for cost of vessel repair, therefore, is $1,571,226.05 ($1,218,704.24 + $352,521.81).

2. Survey Costs

The owners and the underwriters undertook a survey of the damages. A survey was made by North American Marine ($68,897.86) and the United States Salvage Association ($66,329.12). [p. 191] These costs are proper items of damage and the City agrees to pay one-third of the total or $45,075.66.

Additional costs ($47,500) were incurred to prepare the "Statement of Claim of Underwriters," but because the document was prepared solely for insurance purposes, no claim has been made for those costs. [p. 191]

3. Cargo Loss

The ship's cargo of 5,800 short tons of cement was lost. The City and the ship have agreed to settle the cargo loss claim at an amount equal to the market price of cement on the date of the casualty times the amount of cement lost (5,800 short tons @ $55/ton = $319,000). The City is liable for one-third of that amount, or $106,333.33. [See surveyor's memo]

The ship might have additional claims arising out of transportation and disposal of the ruined cement, but has agreed not to pursue these claims in order to more promptly resolve this matter.

4. Losses to the Owner not Covered by Insurance

This item of damages consists of various costs incurred in the course of repair of the vessel, but were not covered by insurance policies. The total amount allocated to "owner's account" was $261,489.85.

Deleted from the "owner's account" were $11,905.02 of dry dock charges that were unrelated to the casualty. [pp. 106, 128-29] (Balance $249.584.83) The remainder consisted of $32,464.19 in overtime charges, [p. 186] $2,194.00 in oil contract cancellation charges, [p. 139] and $214,926.54 in cargo removal charges. [pp. 95, 97, 105, 106-07, 113] These latter items are damages for which the ship's owner is entitled to collect because they were incurred as a direct result of the casualty, although not covered by insurance. The cargo removal charges allocated to the owner's account represents 38% of the total

cost of cargo removal. Sixty-eight percent of the cost was allocated to the hull underwriter because that portion of the work (chipping and cleaning hardened cement off the hull) was necessarily part of the repair of the hull. The remaining 38% (removed from the ship) had to be incurred to repair the ship, although it was not covered by the policies in effect.

The ship, had it not sank, would have had to incur the cost of cargo removal; however, because the ship owned the cement, the dock, the storage facility, and would have removed the cargo with its own employees, the cost of removal would have been quite small. The City has agreed not to seek this off-set in light of the ship's agreement not to pursue transportation and disposal costs discussed under cargo loss.

The portion of the "owner's account" for which the City is liable is $83,194.94. ($249,584.83 - 3)

5. Offset

The ship is liable to pay to the City two-thirds of the City's damages, which consist of the cost of repair to the City's dock.

At the time the dock damage was surveyed, it was estimated that the cost of repairs would be $274,424.82 and it was further agreed that $70,403.22 was for work to be done for the benefit of the City and $204,021.50 to repair damages caused by the ship. Of the latter amount, $9,461.59 was in dispute. [See Survey of Damage to Dock, Feb. 25, 1982, pp. 13-14, 16]

The actual repair cost was $263,725.31. Subtracting half the disputed sum ($4730.80), the cost was $258,993.51. To calculate the portion that should be attributed to the City the $258,993.51 was multiplied by the ratio of the ship/City apportionment agreed to in the original survey. (70,403.22/274,424.82 = 25.7% x 258,993.51 = 66,561.33).

This leaves a balance of $192,432.18 of repair costs attributable to damage caused by the ship. The City is entitled to credit two-thirds of that amount, which is $128,288.12.

6. Conclusion

The City is liable to pay the owner and underwriter of the E.M. Ford the following items of damages:

1. Repair Costs	$1,571,226.05
2. Survey Costs	45,075.66
3. Cargo Loss	106,333.33
4. Owner's Loss	83,194.94
Subtotal	$1,805,829.98
Less: Offset	(128,288.12)
TOTAL	**$1,677.541.86**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al., Plaintiffs, v. CITY OF MILWAUKEE, Defendant.	STIPULATION FOR INTERLOCUTORY PARTIAL JUDGMENT AND SATISFACTION AND INTERLOCUTORY PARTIAL JUDGMENT Civil Action 80-C-1001 (Filed December 17, 1992)

STIPULATION

IT IS HEREBY STIPULATED by and between the parties, by their respective counsel, that an interlocutory partial judgment be entered in this case in favor of the plaintiffs, Cement Division, National Gypsum Company, et al., and against the City of Milwaukee, in the amount of One Million Six Hundred Seventy-Seven Thousand Five Hundred Forty-One and 86/100ths ($1,677,541.86) Dollars, including all costs and attorneys' fees, but excluding prejudgment interest and any costs incurred in connection therewith. [The questions of whether prejudgment interest should be awarded in this case, and if so, the rate of interest will be submitted by the parties to the court for decision.]

IT IS FURTHER STIPULATED that a satisfaction of interlocutory partial judgment be entered because the interlocutory partial judgment has been paid.

IT IS FURTHER STIPULATED that the effective date of both the interlocutory partial judgment and the satisfaction of interlocutory partial judgment be December 4, 1992.

Dated: December 4, 1992

/s/ Harney B. Stover, Jr.
Harney B. Stover, Jr.
Attorney for Plaintiffs

GRANT F. LANGLEY
City Attorney

Date: December 4, 1992

/s/ Rudolph M. Konrad
Rudolph M. Konrad
Deputy City Attorney
Attorney for Defendant

INTERLOCUTORY PARTIAL JUDGMENT

IT IS HEREBY ADJUDGED that an interlocutory partial judgment be and the same hereby is entered in accordance with the above and foregoing stipulation effective December 4, 1992.

Dated at Milwaukee, Wisconsin this 17th day of Dec., 1992.

BY THE COURT:

/s/ Thomas J. Curran
Hon. Thomas J. Curran
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

Plaintiffs,

v.

CITY OF MILWAUKEE,

Defendant.

SATISFACTION AND INTERLOCUTORY PARTIAL JUDGMENT

Civil Action 80-C-1001

(Filed December 17, 1992)

The interlocutory partial judgment entered in the above-entitled action on the 4th day of December, 1992, in favor of plaintiff and against the defendant in the amount of One Million Six Hundred Seventy-Seven Thousand Five Hundred Forty-One and 86/100ths ($1,677,541.86) Dollars, having been fully paid and satisfied, the clerk of said court is hereby authorized to satisfy and discharge said interlocutory partial judgment of record.

Witness my hand and seal this 4th day of December, 1992.

/s/ Harney B. Stover, Jr.

Harney B. Stover, Jr.,
Attorney for Plaintiffs

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Personally came before me this 4th day of December, 1992, the above-named Harney B. Stover, Jr., and acknowledged the execution of the aforementioned satisfaction of interlocutory partial judgment, having thereunto been duly authorized.

/s/ Linda J. Gillet
Notary Public, State of Wisconsin
My Commission 9/8/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CEMENT DIVISION, NATIONAL GYPSUM COMPANY; REED & BROWN, INC.; NEW YORK MARINE MANAGERS, INC.; ALLSTATE INSURANCE COMPANY, c/o American Marine Underwriters, Inc.; HIGHLANDS INSURANCE COMPANY; EMPLOYERS CASUALTY COMPANY OF TEXAS, c/o Texas Marine Underwriters Agency, Inc.; DONALD H. MILLER, INC.; U.S. FIDELITY AND GUARANTEE COMPANY; GREAT LAKES PROTECTIVE ASSOCIATION; THE ATLANTIC COMPANIES; LLOYDS UNDERWRITERS, INSTITUTE COMPANIES, INCLUDING: COMMERCIAL UNION ASSURANCE CO. LTD., "I" A/o. ANDREW WEIR INSURANCE CO. LTD., ENGLISH & AMERICAN INSURANCE CO. LTD., "M" 1 A/o., ORION INSURANCE CO. LTD., "T" A/o. YASUDA FIRE & MARINE INSURANCE CO. (U.K.) LTD., "T" A/o., ATLAS ASSURANCE CO. LTD., "T" A/o., PHOENIX ASSURANCE CO. LTD., BRITISH LAW INSURANCE CO. LTD., ROAD TRANSPORT AND

Case No. 80-C-1001

Judge Thomas J. Curran

GENERAL INSURANCE CO. LTD., INSURANCE COMPANY OF NORTH AMERICA (U.K.) LTD., "G" A/o., INSURANCE COMPANY OF NORTH AMERICA (U.K.) LTD., "O" A/o., HOME INSURANCE CO. LTD., "X" A/o., LONDON & HULL MARITIME INSURANCE CO. LTD., HANOVER INSURANCE CO. LTD., SPHERE INSURANCE CO. LTD., DRAKE INSURANCE CO. LTD., BISHOPSGATE INSURANCE CO. LTD., "F" A/o., BRITISH LAW INSURANCE CO. LTD., NO. 2 A/o., MINSTER INSURANCE CO. LTD., NO. 2 A/o., INSURANCE CORPORATION OF IRELAND, "L" A/o., FOLKSAM INTERNATIONAL INSURANCE CO. (U.K.) LTD., TERRA NOVA INSURANCE CO. LTD. per ANDREW DRYSDALE LTD., ECONOMIC INSURANCE CO. LTD., "GENERAL" A/o., c/o Willis, Faber & Dumas Ltd., Ten Trinity Square, London EC3P 3AX England,

Plaintiff,

vs.

CITY OF MILWAUKEE,

Defendant and Third-Party Plaintiff,

vs.

EDWARD E. GILLEN COMPANY,
a corporation,
and GREAT LAKES TOWING
COMPANY, a corporation,

Third-Party
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs in the above-entitled action hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Final Judgment (styled "Judgment in a Civil Case") of the United States District Court for the Eastern District of Wisconsin, dated and filed May 28, 1993, and from the "Decision and Order" of United States District Judge Thomas J. Curran of the United States District Court for the Eastern District of Wisconsin, dated and filed May 28, 1993, both ordering and adjudging that the defendant, City of Milwaukee, is not liable to the plaintiffs for payment of prejudgment interest on the amount paid in settlement and that this action is dismissed upon its merits.

Dated at Milwaukee, Wisconsin this 24th day of June, 1993.

Harney B. Stover, Jr., Esq.
(WI 1005773; MI P 28864)
Attorney for Plaintiffs

P. O. ADDRESS:
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ORDER LIST

FRIDAY, JANUARY 6, 1995

APPEALS – JURISDICTION NOTED OR POSTPONED

94-631) MILLER, ZELL, ET AL., V. JOHNSON, DAVIDA,
) ET AL.
)
94-797) ABRAMS, LUCIOUS, ET AL., V. JOHNSON,
) DAVIDA, ET AL.
)
94-929) UNITED STATES V. JOHNSON, DAVIDA, ET
) AL.

In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

CERTIORARI GRANTED

94-431 RYDER, JAMES V. UNITED STATES

94-455 JOHNSON, TYSON, ET AL. V. JONES, HOUSTON

94-555 ROCKY MOUNTAIN HOSP., ETC. V. PHILLIPS, JUDITH

94-688 NATL. PVT. TRUCK COUNCIL V. OK TAX COMMN., ET AL.

94-749 HURLEY, JOHN, ET AL. V. IRISH-AMERICAN GAY, ET AL.

94-771 OK TAX COMMN. V. CHICKASAW NATION

94-859 BABBITT, SEC. OF INTERIOR V. SWEET HOME CHAPTER, ET AL.

The petitions for writs of certiorari are granted.

94-514 UNITED STATES V. GAUDIN, MICHAEL

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

94-788 MILWAUKEE, WI V. CEMENT DIV., NATL. GYPSUM

The petition for a writ of certiorari is granted.

Justice Breyer took no part in the consideration or decision of this petition.

94-834) NORTH STAR STEEL CO. V. THOMAS,
) CHARLES, ET AL.
)
94-835) CROWN CORK & SEAL CO. V. UNITED STEELWKRS. OF AM.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

94-6187 WITTE, STEVEN KURT V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

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(5)

No. 94-788

Supreme Court, U.S.
FILED
FEB 21 1995
CLERK OF THE COURT

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

vs.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In an admiralty collision case, is a genuine dispute regarding liability in a mutual fault case a peculiar circumstance permitting the district court in its discretion to deny a request for prejudgment interest by a party bearing twice as much fault as the party from whom interest is sought?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Milwaukee and the respondents Cement Division, National Gypsum Company; Reed & Brown, Inc.; New York Marine Managers, Inc.; Allstate Insurance Company, c/o American Marine Underwriters, Inc.; Highlands Insurance Company; Employers Casualty Company of Texas, c/o Texas Marine Underwriters Agency, Inc.; Donald H. Miller, Inc.; U.S. Fidelity and Guarantee Company; Great Lakes Protective Association; The Atlantic Companies; Lloyds Underwriters, Institute Companies, including: Commercial Union Assurance Co. Ltd., "I" A/o. Andrew Weir Insurance Co. Ltd., English & American Insurance Co. Ltd., "M" 1 A/o., Orion Insurance Co. Ltd., "T" A/o. Yasuda Fire & Marine Insurance Co. (U.K.) Ltd., "T" A/o., Atlas Assurance Co. Ltd., "T" A/o., Phoenix Assurance Co. Ltd., British Law Insurance Co. Ltd., Road Transport and General Insurance Co. Ltd., Insurance Company of North America (U.K.) Ltd., "G" A/o., Insurance Company of North America (U.K.) Ltd., "O" A/o., Home Insurance Co. Ltd., "X" A/o., London & Hull Maritime Insurance Co. Ltd., Hanover Insurance Co. Ltd., Sphere Insurance Co. Ltd., Drake Insurance Co. Ltd., Bishopsgate Insurance Co. Ltd., "F" A/o., British Law Insurance Co. Ltd., No. 2 A/o., Minster Insurance Co. Ltd., No. 2 A/o., Insurance Corporation of Ireland, "L" A/o., Folksam International Insurance Co. (U.K.) Ltd., Terra Nova Insurance Co. Ltd. per Andrew Drysdale Ltd., Economic Insurance Co. Ltd., "GENERAL" A/o., c/o Willis, Faber & Dumas Ltd., Ten Trinity Square, London EC3P 3AX England.

LIST OF PARTIES – Continued

Petitioner, City of Milwaukee, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 31 F.3d 581. The opinion of the district court (Pet. App. 19a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on October 31, 1994, and granted on January 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. On Christmas Eve, 1979, the S/S EM Ford was moored at a berth at the Port of Milwaukee when a severe winter storm arose. The Ford broke away, crashed into the headwall of the berth, and sank to the bottom of Milwaukee Harbor. Pet. App. 2a; J.A. 26. In 1980, respondents, the owner and insurers of the Ford, brought suit in admiralty in the United States District Court for the Eastern District of Wisconsin. They sought $6.5 million in damages from petitioner, the City of Milwaukee, for the loss of the Ford and its cargo. Pet. App. 2a; J.A. 29.[1] Respondents alleged that the City should have warned of the dangers that might occur if a storm arose. J.A. 27.

[1] The court of appeals appears to have misstated the amount of damages sought. See J.A. 29.

The City denied liability, urging that a wharfinger has no duty to warn of the dangers of storms. The City further asserted that respondents were contributorily negligent in leaving the Ford in its outer harbor berth essentially unattended during the winter, "with no means aboard of monitoring weather or summoning tugs or a pilot for assistance" (J.A. 27). On this basis the City counterclaimed for $250,000 in damage to the dockwall. Pet. App. 2a.

The trial on liability was not conducted until 1986. It lasted approximately three weeks. J.A. 35. The district court did not issue its decision until 1989. J.A. 36. The district court found respondents 96% liable and the City 4% liable. Pet. App. 3a. The United States Court of Appeals for the Seventh Circuit reversed and, without remanding, itself reapportioned the parties' liability, finding respondents two-thirds responsible and the City one-third responsible. *Cement Division, National Gypsum Co. v. City of Milwaukee*, 915 F.2d 1154 (1990). After this Court denied certiorari, 499 U.S. 960 (1991), the parties entered into a settlement agreement under which the City paid $1,677,541.86 in damages to the respondents. Pet. App. 3a, 17a. The agreement provided that the district court would decide whether prejudgment interest was to be awarded. J.A. 46.

2. Respondents then sought an award of $5,317,807.70 in prejudgment interest from the district court. The district court denied prejudgment interest. Pet. App. 20a-23a. The district court began its analysis by recognizing that, in admiralty cases, "an award of prejudgment interest . . . is the rule rather than the exception" and that "a court may exercise its discretion to deny

prejudgment interest" only "if unusual circumstances exist." Id. at 21a. But among such unusual circumstances, the court noted, are a " 'genuine dispute over a good faith claim . . . in a mutual fault situation' " and circumstances in which " 'the [p]laintiff's contributory negligence is [of] such a magnitude as to make an award of prejudgment interest inequitable.' " Ibid., quoting *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1080 n. 17 (5th Cir. 1992) (citation omitted), rev'd on other grounds, 114 S. Ct. 1461 (1994). In this case, the district court held, an award of prejudgment interest was unwarranted for those reasons. Pet. App. 22a.

The district court also mentioned, as an additional reason for denying prejudgment interest, the fact that the City, because it is a municipal government, could not have "accru[ed] market rate interest on the funds" it was ultimately determined to owe to respondents. Pet. App. 22a. Under Wisconsin law, a municipality "has no power to set aside an interest bearing fund at the time of a loss, but can only levy taxes to pay a settlement or final judgment." Ibid. (citation omitted).

The court of appeals reversed. Pet. App. 1a-15a. The court of appeals also recognized that admiralty, while generally requiring the award of prejudgment interest, has historically allowed a district court "discretion to deny prejudgment interest where it finds that special or peculiar circumstances would render such an award inequitable." Id. at 4a. The court of appeals further acknowledged that numerous cases had recognized good faith dispute in a mutual fault case as a justification for a discretionary denial of prejudgment interest. Id. at 5a, 6a, 8a.

The court of appeals held, however, that because of this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), "there no longer exists a reason to deny prejudgment interest in collisions cases involving mutual fault." Pet. App. 8a. *Reliable Transfer* overturned the "divided damages" rule, which provided that if the two parties to a maritime collision are each to some degree negligent, total damages must be divided equally rather than apportioned according to comparative fault. See 421 U.S. at 397. *Reliable Transfer* replaced this rule with a rule of comparative fault, the same rule that had long governed personal injury actions in admiralty. See id. at 407.

The court of appeals asserted that the discretionary authority to withhold prejudgment interest in "mutual fault" cases in which there is a "genuine dispute" had served to mitigate the sometimes harsh effects of the divided damages rule. Pet. App. 8a. Therefore, the court concluded, *Reliable Transfer* had removed the justification for this exercise of discretion. Pet. App. 8a-9a. The court of appeals recognized that, under prior decisions, uncertainty about the existence and extent of the defendant's liability might also justify denying prejudgment interest. Id. at 10a-11a. The court of appeals explained these decisions as follows (id. at 11a):

> [U]sing uncertainty as a basis to deny interest in a mutual fault case made sense under the old divided damages regime. This is because under that rule, it was not until after trial that there would be a determination from the district court as to which of the parties would have to come up with the extra money to make the other party whole.

But the court of appeals asserted that *Reliable Transfer*, by overruling the divided damages rule, had reduced the amount of uncertainty in collision litigation to such an extent that "uncertainty as to eventual liability can no longer be a factor to consider in determining whether to deny prejudgment interest in cases involving mutual fault." Id. at 11a-12a.[2] The court accordingly stated: "We . . . conclude that, as a matter of law, the mutual fault of the parties should not constitute a reason to deny an award of prejudgment interest in admiralty." Id. at 9a.

The court of appeals then discussed the rate of prejudgment interest that was to be assessed. The "best starting point," the court said, was "an average of the prime rate for the years in question." Pet. App. 14a. Alternatively, the district court might "set the rate of interest to match that which lenders would charge the City for short-term, unsecured loans." Id. (citations omitted).

SUMMARY OF ARGUMENT

A. Prejudgment interest has traditionally been available in admiralty. But prejudgment interest has never been available in admiralty as a matter of right. From the earliest decisions, this Court has emphasized that an award of prejudgment interest in admiralty is

[2] The court of appeals also rejected the district court's ruling that petitioner's status as a municipal government, limited in its ability to hold interest-bearing funds, was a factor justifying a denial of prejudgment interest. Pet. App. 13a.

discretionary with the trial court. The Court has, moreover, repeatedly reaffirmed the discretionary nature of prejudgment interest awards in cases arising under federal statutes. Congress has deliberately left this discretionary and equitable federal prejudgment interest regime intact.

B. The district court in this case exercised its discretion to deny prejudgment interest because both parties were at fault and the City had good reason to believe that it would not be held liable. Such an exercise of discretion is consistent both with this Court's decisions and with the underlying logic of prejudgment interest. Prejudgment interest is not just an element of a plaintiff's compensation; it also operates to impose a cost on the defendant that results from the defendant's decision to continue to contest the litigation. That is because an award of prejudgment interest forces the defendant to become, in effect, an involuntary debtor who must pay the plaintiff a market rate of interest for the entire period during which it contests liability. When the defendant's decision to continue litigating is a reasonable one – as will often be true in a case of mutual fault and good faith dispute over the facts – the district court may, in its discretion, decide that that reasonable decision should not be burdened by an award of prejudgment interest.

This understanding of prejudgment interest – that it is not just an element of compensation but a burden imposed on the defendant for continuing to litigate – explains why this Court has consistently viewed prejudgment interest as discretionary. It also explains the universal agreement that prejudgment interest may not be awarded when a plaintiff delays the litigation. For there

is only a difference of degree, not of principle, between unreasonable delay by the plaintiff and a reasonable decision by the defendant to continue litigation. Finally, imposing the burden of prejudgment interest on the defendant, when the plaintiff was the party primarily at fault, offends the notions of fairness and equity that, this Court has repeatedly said, are the touchstones in determining whether to award prejudgment interest.

C. The court of appeals recognized that it was overturning a rule that many lower courts had accepted, but it concluded that this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), justified it in doing so. This conclusion was doubly mistaken. First, when the courts wished to amelioriate the inequities of the divided damages rule overturned in *Reliable Transfer*, they did so by adopting explicit, well-focused rules, such as the major-minor fault doctrine and the *in extremis* doctrine. The prejudgment interest principle at issue here would have been a crude, inefficient, and of course disingenuous way to "compensate for" the inequities of the divided damages rule. Second, *Reliable Transfer* in fact increased the uncertainty faced by parties to maritime collision litigation. If, as the court of appeals seemed to accept, uncertainty is a reason justifying withholding prejudgment interest, *Reliable Transfer* actually strengthens the case for the principle that the court of appeals discarded.

ARGUMENT

THE COURT OF APPEALS ERRED IN DENYING THE DISTRICT COURT ALL DISCRETION TO WITHHOLD PREJUDGMENT INTEREST ON GROUNDS OF MUTUAL FAULT.

A. Trial Courts Have Traditionally Had Discretion To Withhold Prejudgment Interest When Its Award Would Be Inequitable.

1. The common law was hostile to awards of prejudgment interest. See *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 & n.2 (1986). The traditional common law rule is that prejudgment interest is available only on damages awards that are liquidated or "ascertainable." See 1 D. Dobbs, Law of Remedies § 3.6(1) at 336-37 (1993); Note, *Prejudgment Interest: Survey and Suggestions*, 77 Nw. U. L. Rev. 192, 196-97 (1982) (citing sources). This rule – which was widely criticized (see, *e.g.*, *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168 (1933)) – precluded prejudgment interest in most personal injury cases and in many cases involving property damage. See, *e.g.*, D. Dobbs, § 3.63(1) at 336 & n.17; *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 337 (1988).

Admiralty did not share the common law hostility to prejudgment interest, and prejudgment interest has traditionally been available in admiralty. See, *e.g.*, *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 560 (1818); Geraghty & Stiles, *Damages*, 2 Benedict on Admiralty § 84, at 7-87 n.38 (7th ed. 1993). But prejudgment interest in admiralty is not available as a matter of right. The trial court has broad equitable discretion in deciding whether to award prejudgment interest. This Court settled this point long

ago. In *The Scotland*, 118 U.S. 507, 518-19 (1886), the Court upheld a denial of prejudgment interest, and Justice Bradley's opinion for the Court stated:

> The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury.

In *The Maggie J. Smith*, 123 U.S. 349 (1887), Justice Field's opinion for the Court brusquely dismissed a contention that the lower courts had erred in denying prejudgment interest: "[I]t is sufficient to say that the allowance of such interest and costs rested in the discretion of the court below, and its action will not be disturbed on appeal." Id. at 356. The courts of appeals have repeatedly reaffirmed the rule that while there is a presumption in favor of awarding prejudgment interest in admiralty, an award of prejudgment interest remains discretionary. See, *e.g.*, *The Wright*, 109 F.2d 699 (2d Cir. 1940); *The President Madison*, 91 F.2d 835, 847 (9th Cir. 1937); 34 ALR Fed 126, 144-46 (1977 & Supp. 1994) (collecting cases).

2. Although this Court has not recently considered the availability of prejudgment interest in admiralty, it has decided a number of cases involving prejudgment interest on federal claims. In these cases the governing statute was typically either silent or unclear on the question whether prejudgment interest should be awarded. These cases are a reliable guide to how prejudgment interest should be treated in admiralty. That is because there is no general federal statute governing prejudgment

interest. Cf. 28 U.S.C. 1981 (providing for awards of post-judgment interest). As a result, the law on prejudgment interest, in the absence of clear statutory directives, is essentially judge-made. "[T]his Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court." *Rodgers v. United States*, 332 U.S. 371, 373 (1947). Admiralty, of course, is a similar combination of statutory policies and "general principles" (ibid.) of a common law nature. See, *e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990).

A consistent theme in these statutory cases is the same as that announced by Justices Bradley and Field in their admiralty opinions from a century ago: if prejudgment interest is available, the trial court has broad equitable discretion to decide whether to award it. See also D. Dobbs, § 3.6(5) at 357, 360-61. This Court has explicitly stated, on many occasions, that prejudgment interest may be withheld where an award would be "inequitable." Thus in *Blau v. Lehman*, 368 U.S. 403 (1962), the Court affirmed the denial of prejudgment interest on a damages award under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), on the ground that the "courts below denied interest . . . and we cannot say that the denial was either so unfair or so inequitable as to require us to upset it." 368 U.S. at 414. The Court further explained, quoting an earlier decision, *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939):

> "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but

> is given in response to considerations of fairness. It is denied when its exaction would be inequitable."

Blau, 368 U.S. at 414, quoting *Board of Commissioners*, 308 U.S. at 352. *Board of Commissioners*, in turn, relied on *United States v. Sanborn*, 135 U.S. 271, 281 (1890), and *Billings v. United States*, 232 U.S. 261 (1914). See also *Miller v. Robertson*, 266 U.S. 243, 258 (1924): "[W]hen necessary to arrive at a fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), the Court sounded the same note: a district court has equitable discretion in deciding whether to award prejudgment interest. Indeed, the discretionary character of the district court's decision was central to the Court's reasoning in *Osterneck*. *Osterneck* held that the filing of a motion for prejudgment interest in the district court constitutes a motion to alter or amend the judgment, under Federal Rule of Civil Procedure 59, and therefore renders ineffective a previously filed notice of appeal. 489 U.S. at 170. The Court noted that "prejudgment interest traditionally has been considered part of the compensation due plaintiff." Id. at 175. But the Court went on to explain (id. at 176; footnote omitted):

> In deciding if and how much prejudgment interest should be granted, a district court . . . will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment

> opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness.[3]

The factors that the Court mentioned – especially "the degree of personal wrongdoing on the part of the defendant" and "other fundamental considerations of fairness" – leave no doubt that the Court envisioned a broad equitable discretion for district courts in determining whether to award prejudgment interest.

Even when the right to prejudgment interest is clear from a statute or from precedent, the Court has recognized the trial judge's equitable power to decide whether interest is properly awarded. For example, in *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), the Court ruled that a 1946 amendment to 35 U.S.C. 284, the provision of the patent laws governing recovery in infringement actions, overturned the common law rule that

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[3] The Court noted that this case was a "federal securities action" and stated that it was "offer[ing] this list of factors, taken from lower court opinions" rather than authoritatively "specify[ing] what factors a district court must consider when deciding under federal law whether to grant prejudgment interest" (489 U.S. at 176 & n. 2).

Although the Court made clear that its interpretation of Rule 59 would apply equally to a case in which prejudgment interest might be available "as of right," the Court explained that that conclusion was justified in part because of the need to have a bright-line rule governing prejudgment interest motions generally. 489 U.S. at 176 n. 3. Thus the fact that prejudgment interest was discretionary in the ways that the Court identified was central to the Court's conclusion that a motion for prejudgment interest is to be treated as a motion to alter or amend the judgment. See id. at 175-76.

prejudgment interest would be allowed only when a damages award was liquidated. 461 U.S. at 653. Notwithstanding this clear indication of legislative intent, the Court did not hold that prejudgment interest was available as a matter of right; instead it adopted an approach comparable to the admiralty rule. The Court stated: "We hold only that prejudgment interest should be awarded under § 284 absent some justification for withholding such an award." 461 U.S. at 657. The Court carefully explained (id. at 656-57; footnote omitted):

> We do not construe § 284 as requiring the award of prejudgment interest whenever infringement is found. . . . [I]n our view [§ 284] leaves the court some discretion in awarding prejudgment interest. For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit. There may be other circumstances in which it may be appropriate not to award prejudgment interest. We need not delineate those circumstances in this case.[4]

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[4] Similarly, in *Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988), the Court ruled that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., provided for awards of prejudgment interest; but the Court was careful to rule not that Title VII requires prejudgment interest as a matter of right but only that Title VII "authorizes" prejudgment interest (486 U.S. at 557), that a defendant "may be subjected" to prejudgment interest (id. at 558) and that prejudgment interest "may be awarded" (id. at 565) – making plain that the district court retains some discretion to withhold prejudgment interest in appropriate cases.

Finally, the Court has reaffirmed the equitable power of the district court even in a situation in which it considered the right to prejudgment interest to have the deepest roots. In *United States v. Texas*, 113 S. Ct. 1631 (1993), the Court noted the " 'longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money.' " Id. at 1634, quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987) (citations omitted). The Court further stated that this "longstanding rule" extended to debts owed by state and local governments. 113 S. Ct. at 1634. Nonetheless, the Court explicitly "cautioned that a federal court considering the question in an individual case should weigh the federal and state interests involved" (ibid.) and, to make the point clear, stated:

> The duty to pay prejudgment interest under the common law, however, is by no means automatic. Before imposing prejudgment interest, the courts must weigh the competing federal and state interests.

Id. at 1635, citing *West Virginia*, 479 U.S. at 309-11, and *Board of Commissioners*, 308 U.S. at 350.[5]

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[5] The Court's discussion of *West Virginia v. United States* in *United States v. Texas* establishes that a brief statement in a footnote in the prior case, rejecting a freewheeling "balancing of equities between the parties" (479 U.S. at 311 n. 3), did not alter the equitable and discretionary nature of prejudgment interest – even in a case in which the right to prejudgment interest is at its strongest, by virtue of the "longstanding tradition" identified by the Court. Indeed, *West Virginia v. United States* had gone on to state explicitly that "an equitable consideration, such as laches" might bar "an otherwise valid claim for interest." Ibid.

3. Not only have the courts, including this Court, consistently eschewed a strict requirement of prejudgment interest; Congress has done so as well.[6] Postjudgment interest, like prejudgment interest, was also not allowed at common law. See *Pierce v. United States*, 255 U.S. 398, 406 (1921). Congress has enacted a general postjudgment interest statute, 28 U.S.C. 1961, which provides for postjudgment interest in mandatory terms: "Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of entry of the judgment. . . ." See *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990).

But Congress has enacted no general prejudgment interest statute. Instead, it has elected to leave in place the explicitly discretionary and equitable regime that the courts, including this Court, have established. In fact, in 1982, when Congress amended Section 1961 to modify the postjudgment interest rate (Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 55-56), Congress specifically deleted from the bill a proposal that would have required prejudgment interest. See S. Rep. No. 97-275, 97th Cong., 1st Sess. 11-12 (1981); *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 339 n.8 (1988). Indeed, the evidence of Congressional endorsement of the discretionary regime is even stronger,

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[6] Many states that have rejected the traditional common law approach have also determined, by statute or judicial decision, that prejudgment interest is to be awarded in the discretion of the trial court or the jury. See, *e.g.*, West's Ann. Cal. Civ. Code § 3288; Note, *Prejudgment Interest*, 77 Nw. U. L. Rev. at 204 & nn. 73, 74 (citing cases).

because the proposed general prejudgment interest provision would have established a discretionary standard. The Senate Report specifically noted that the bill provided prejudgment interest only "where a defendant knew of his liability," and that "[t]he imposition of such interest would be left to the discretion of the district judge in each case." S. Rep. No. 97-275 at 12.

Especially in a complex area where the law is in substantial measure a product of history, as the rules governing prejudgment interest are, Congress's decision not to act should be taken as an endorsement of the judge-made regime, with its heavy emphasis on equitable discretion. The Court's decision in *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988), stands for this proposition. There, the Court addressed the question whether the Federal Employers' Liability Act, 45 U.S.C. 51 et seq., allowed prejudgment interest. In addition to other indications of congressional intent, the Court noted that judicial decisions had consistently ruled that prejudgment interest was not available under FELA and that Congress had taken no action to overturn that consistent pattern. 486 U.S. at 338-39. A parallel situation obtains here. In admiralty and elsewhere, the federal courts have consistently ruled that prejudgment interest lies in the equitable discretion of the trial court, and Congress has declined to upset that state of affairs. This strongly suggests that the discretionary character of prejudgment interest in the federal courts should not be disturbed. Cf. *Miles v. Apex Marine Corp.*, 498 U.S. at 24.

B. In Exercising Its Discretion, A Court May Properly Withhold Prejudgment Interest When There Is A Good Faith Dispute In A Case Of Mutual Fault.

1. This Court has, in general, defined the district court's discretion over prejudgment interest awards in broad terms. Often the Court has simply stated that an award of prejudgment interest rests in the district court's discretion – as it did in the admiralty cases that determined the course of the law in this area, *The Scotland*, 118 U.S. at 518-19, and *The Maggie J. Smith*, 123 U.S. at 356. See page 9, supra. More modern cases have stated that an award of prejudgment interest can be withheld if it would be "inequitable" to grant it (see, *e.g.*, *Blau*, 368 U.S. at 414; *Board of Commissioners*, 308 U.S. at 352) or if "fundamental considerations of fairness" would justify its denial (*Osterneck*, 489 U.S. at 176). See also *United States v. Texas*, 113 S. Ct. at 1635 ("the courts must weigh the competing federal and state interests").

When it has spoken more specifically, though, this Court has said, among other things, that "a persuasive consideration in determining whether . . . [to allow prejudgment] interest is the relative equities" of the parties. *Rodgers*, 332 U.S. at 373. Consistent with this suggestion, the lower courts, in admiralty cases, have held that prejudgment interest may be denied in a case of mutual fault, at least if – as in this case – the party being assessed interest had substantial reason to believe that it might not be held liable at all. See, *e.g.*, *McDermott, Inc. v. Clyde Iron*, 979 F.2d 1068, 1080 (5th Cir. 1992), rev'd on other grounds, 114 S. Ct. 1461 (1994); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157-58 (5th Cir. 1990); *Parker*

Towing Co. v. Yazoo River Towing, Inc., 794 F.2d 591, 594 (11th Cir. 1986); *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 328 (5th Cir. 1983); *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982); *Nat G. Harrison Overseas Corp. v. American Tug Titan*, 516 F.2d 89 (5th Cir. 1975); *Iberian Tankers Co. v. Gates Construction Co.*, 504 F.2d 747, 748 (2d Cir. 1974).[7]

The reason for allowing prejudgment interest to be denied in such a case is not difficult to discern. It is true

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[7] The court of appeals, in rejecting this approach, relied on *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789 (9th Cir. 1980). But the court below read far more into *Alkmeon Naviera* than is warranted. In *Alkmeon Naviera*, the district court, in denying prejudgment interest, gave no explanation for its action. Id. at 797. This alone would have justified overturning its decision. In a footnote, the *Alkmeon Naviera* court suggested, somewhat tentatively, that it would reject an approach under which mutual fault alone – without the element of a good faith dispute – would justify denying prejudgment interest. Id. at 798 n. 12. But the *Alkmeon Naviera* court did not reject the principle at issue here: that mutual fault, combined with a good faith dispute, might justify withholding prejudgment interest. On the contrary, the *Alkmeon Naviera* court suggested that a district court might have discretion to deny prejudgment interest in such circumstances if it entered "a specific finding" to that effect. Id. at 798. This reading of *Alkmeon Naviera* is buttressed by the fact that the *Alkmeon Naviera* court disagreed only with decisions of the Second Circuit and did not discuss decisions of the Fifth Circuit on this point (see ibid.); the Fifth Circuit has been the strongest proponent of allowing district judges to deny prejudgment interest when there is mutual fault and a good faith dispute. See pages 17-18, supra.

The court of appeals also relied on *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), which did reject the approach we advocate here. We discuss the specific error in the rationale of *Anderson* (adopted as well by the court below) in Part C.

that, because of the time value of money, a plaintiff is sometimes not fully compensated by the award of damages without interest. See, *e.g.*, *Monessen Southwestern Railway Co.*, 486 U.S. at 335. But prejudgment interest cannot be seen as simply an element of compensation. If it were, the discretionary nature of prejudgment interest would be inexplicable. And as we have shown, the discretionary nature of prejudgment interest has been emphasized repeatedly by the Court.

In fact, in addition to serving as an element of compensation, an award of prejudgment interest operates in some ways as a cost imposed on the defendant for litigating its claim. See, *e.g.*, *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 258 (3d Cir.), vacated on other grounds, 451 U.S. 935 (1981) ("An award of interest here would punish the [defendant] unfairly because it exercised its right to proceed to trial."); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1198 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975). As an analytical matter, a defendant comes to owe prejudgment interest not as a result of the wrongful act alleged by the plaintiff, but as a result of pursuing the litigation. This is why the Court has frequently characterized prejudgment interest as "delay damages." See, *e.g.*, *General Motors Corp. v. Devex Corp.*, 461 U.S. at 656; see also *Library of Congress v. Shaw*, 478 U.S. at 321-23. For a defendant, interest is a cost resulting not from the decisions that led to its alleged tort, but from its decision to continue defending itself in litigation instead of accepting whatever settlement the plaintiff might choose to offer.

This case illustrates the point. If the court of appeals' approach prevails, the City may be liable to respondents for more than 15 years' worth of prejudgment interest.

But more than a decade into this litigation – as late as October 1990, just before the court of appeals rendered its decision on the liability issue – the City would have been fully justified in believing that it would not have to pay respondents anything. The City had denied that it owed any duty to warn of the danger of storms, and the district court, agreeing almost entirely with the City, had determined that the City was only 4% liable for the total damage (a ruling that required the City, which also had its property damaged, to pay less than $32,000).[8]

The bulk of the City's liability for prejudgment interest, therefore, stems directly from its justified refusal, for the first decade of the litigation, when it appeared that the City would have no significant liability, to settle the litigation on the terms that respondents might have demanded. It was that decision by the City, rather than anything done in the period leading up to the Christmas Eve accident, that will precipitate most of an award of prejudgment interest. Prejudgment interest must, therefore, be seen in part as a price exacted from the City for its decision not to settle, a decision that on the facts of this case can scarcely be regarded as unreasonable.

2. In theory, it might be suggested, an award of prejudgment interest does not in fact burden a defendant's decision to continue to litigate. The theoretical argument is that during the course of the litigation, the defendant retains the sum that (it is ultimately determined) rightfully belonged to the plaintiff. The defendant

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[8] We made this calculation on the basis of the total amount of damages agreed to by the parties in the settlement. See J.A. 40-45.

was able to earn interest on the sum during that time, and paying that interest over to the plaintiff, this theoretical argument concludes, leaves the defendant no worse off.

Reality does not, however, conform so neatly to economic theory. In this case, for example, the court of appeals ordered the district court to calculate prejudgment interest at either the "average of the prime rate for the years in question" or "the rate . . . [that] lenders would charge the City for short-term, unsecured loans." Pet. App. 14a. The practical effect of the court of appeals' ruling in this case, therefore, is to treat the City as if it had agreed to guarantee respondents a return equal to the prime rate on an investment of approximately $1.67 million invested for over 15 years. Every investor will recognize that as an excellent investment opportunity. Yet that is what the City may be required to give to respondents as a result of its decision to contest the litigation.

To put the point another way, the City, under the court of appeals' approach, is forced to make interest payments equal to those it would have owed for borrowing $1.67 million on the market for 15 years. A decision to borrow a large sum for a long term at market rates of interest is not a decision that any unit of government, or any business, would make lightly. But the effect of the court of appeals' decision is that the City now discovers that, by continuing to contest respondents' suit against it, it effectively made just such a decision. In this respect, too, an award of prejudgment interest is not just a matter of placing both parties in the position they would have been in if the defendant had fully compensated the plaintiff; it imposes a significant burden on the defendant for continuing the litigation.

Finally, an award of prejudgment interest is burdensome to the defendant because of the cash flow implications. In theory the City should have readily at its disposal the $5.3 million in interest that, according to respondents, it has earned over the years on the damages it now owes. But in practice, many firms, and certainly many state and local governments, do not operate in that way. The interest that petitioner "earned" on the damages award it has now paid to respondents was either devoted to services for the citizens of Milwaukee or, more likely, was never raised in taxes and so remained in the taxpayers' pockets.

The notion that the taxpayers earned the prime rate on these funds is fictitious. But beyond that, the need to raise a large sum of cash in a short time can be immensely disruptive, especially to a unit of government. This Court has recognized as much: the Court has ruled, for example, that the Eleventh Amendment, while not protecting states from injunctive relief that effectively requires them to spend large sums in the future, does bar retrospective damages awards, partly because of the additionally disruptive effects of such awards. See *Edelman v. Jordan*, 415 U.S. 651, 666 n.11 (1974).

3. Awards of prejudgment interest are, therefore, properly seen, in part at least, as a burden imposed on the defendant as a result of its decision to continue to litigate. Once prejudgment interest is seen in this way – as it has been for centuries – the discretionary regime that traditionally governs prejudgment interest awards, and the courts' repeated references to equitable considerations and the relative fault of the parties, become readily understandable. In addition, the basis of the rule applied

by the district court – that prejudgment interest may be denied when there is a good faith dispute in a case of mutual fault – becomes clear.

Specifically, in cases of mutual fault, a defendant will sometimes reasonably believe that it might not be held liable at all. Cf. S. Rep. No. 97-275 at 12 (the proposed general prejudgment interest statute allowed prejudgment interest only "where a defendant knew of his liability"). That is particularly true when, as in this case, the defendant itself has suffered an injury, for which the plaintiff might be held responsible. The defendant's belief that it might not be held liable is even more reasonable when it is clear that the bulk of the fault resides with the plaintiff. That is indisputable in this case; the issue between the district court and the court of appeals was whether respondents were two-thirds responsible or 96% responsible.

When, as here, the defendant had a reasonable belief, throughout the litigation, that it might not be held liable because of the plaintiff's fault, it may be reasonable for the defendant to continue to defend itself. And if the decision to continue the litigation is reasonable – in the judgment of the district court, which is of course in the best position to make that determination – then the district court should also be allowed to detemine that the defendant will not be burdened, by an award of prejudgment interest, for continuing to litigate.

Of course this will not be true in all cases involving mutual fault. The district court did not rule, and we do not contend, that mutual fault always warrants withholding prejudgment interest. On the contrary, in some cases

of mutual fault it will be apparent from the outset that the defendant is likely to be held liable for a substantial amount, for example if the plaintiff's fault is relatively slight or the defendant's fault is clear. Other factors may be relevant as well, such as the settlement offers made by the respective parties. Sometimes the reasonableness of the defendant's conduct will change over the course of the litigation, if it becomes clear that the plaintiff's responsiblility is less than first appeared, or that the defendant cannot escape substantial liability. The district court will, of course, be in the best position to assess these various factors and adjust the award of prejudgment interest accordingly, subject to review for abuse of discretion. The error of the court of appeals, however, was to declare that mutual fault can *never* be the basis for the district court's determination to withhold prejudgment interest.[9]

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[9] Several states have recognized the logic of this position – that an award of prejudgment interest should depend on the reasonableness of the defendant's decision to continue to litigate – by linking prejudgment interest awards to the defendant's willingness to settle on reasonable terms. For example, under Ohio Rev. Code Ann. § 1343.03(C), a party to a tort action is not subject to prejudgment interest unless the court finds that it "failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." See *Kalain v. Smith*, 25 Ohio St.3d 157, 495 N.E.2d 572 (1986) (syllabus): "If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." Similarly, under California law, prejudgment interest is available in personal injury actions only when the defendant refuses a settlement offer and subsequently is held liable for a larger amount. See West's Ann. Cal. Civ. Code § 3291 (Supp. 1995).

4. This feature of prejudgment interest – its effect in burdening the defendant for continuing to litigate – alone explains a point on which, it appears, there is no controversy: that prejudgment interest can be withheld if the plaintiff unnecessarily delays the litigation. See, *e.g.*, *Osterneck*, 489 U.S. at 176; *General Motors Corp. v. Devex Corp.*, 461 U.S. at 176-77. Under the simplistic compensatory model of prejudgment interest, even if litigation is unduly prolonged, an award of prejudgment interest does not give the plaintiff more than it should receive, or cause a defendant to lose more than it should; the defendant simply disgorges the interest it has earned on the damages, and the plaintiff is merely made whole for the lost time value of its damages.

But the courts uniformly recognize that generally the plaintiff will profit unfairly from an award of prejudgment interest if it unreasonably delays the litigation.[10] The reason is, as we have explained, that an award of prejudgment interest effectively allows the plaintiff to make the defendant an involuntary debtor who must pay a substantial rate of interest.

There is only a difference in degree – not in principle – between a situation in which a plaintiff prolongs litigation in bad faith and one in which a defendant reasonably declines to settle on terms favorable to the plaintiff. In both cases, the costs of continuing the litigation – including prejudgment interest – should not properly be viewed

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[10] *Alkmeon Naviera*, a case on which the court below relied (mistakenly, in our view; see page 18 note 7 supra), stated that this "is the most common ground for denial" of prejudgment interest. 633 F.2d at 797.

as the defendant's sole responsibility. The apparently settled rule that a plaintiff may not recover prejudgment interest if it deliberately prolongs the litigation, therefore, logically entails a rule that a court may consider, in awarding prejudgment interest, the reasonableness of the defendant's decision to pursue the litigation. This is not to say that courts should treat the two situations – deliberate delay by the plaintiff and a reasonable decision to continue litigating by the defendant – in the same way; manifestly they need not. But it is to say that the court of appeals' approach, which ruled out of bounds any consideration of important factors bearing on the reasonableness of the defendant's conduct of the litigation, cannot be sustained.

5. Finally, there is the question of – in this Court's words – "fundamental considerations of fairness" (*Osterneck*, 489 U.S. at 176), and whether an award of prejudgment interest in a case like this would be "inequitable" (*Blau*, 368 U.S. at 414; *Board of Commissioners*, 308 U.S. at 352). Respondents were, indisputably, far more responsible for the accident in this case than the City. The district court, which heard the evidence, found that the City was essentially not responsible at all. See *Osterneck*, 489 U.S. at 176 (identifying "the degree of personal wrongdoing on the part of the defendant" as a basis on which courts have denied prejudgment interest).

As we have shown, there is no tradition – in the common law or in federal law, including admiralty – of treating prejudgment interest as a remedy that is available as a matter of right. Since the inquiry is to some degree an equitable one, it is difficult to see why the relative fault of the parties should *not* bear upon whether

prejudgment interest can be awarded. At common law, under the doctrine of contributory negligence, a plaintiff who was at fault to any degree could not recover damages. Admiralty did not accept that harsh rule. As a result, not only can a party at fault recover in admiralty, but in this case a party that is at least two-thirds responsible recovered $1.67 million in damages.

But it would be a sharp break with tradition to hold that a party that is predominantly at fault not only can recover damages, and not only can recover prejudgment interest if the district court so decides, but has a right to prejudgment interest even when the district court determines that prejudgment interest would be inequitable. If the traditions of equity and discretion that are such a prominent part of the law of prejudgment interest mean anything, they must mean that in cases in which the defendant had reason to believe it was not at fault at all, and the plaintiff unquestionably had principal responsibility, the district court is not required as a matter of law to award prejudgment interest to the more guilty party.

C. *Reliable Transfer* Does Not Undermine, But In Fact Reinforces, The Principle Allowing Prejudgment Interest To Be Denied When There Is A Good Faith Dispute In A Case Of Mutual Fault.

The court of appeals did not deny that numerous cases had recognized that good faith dispute in a case of mutual fault could be a basis for denying prejudgment

interest. Instead, the court explicitly ruled that this principle, which was even embraced by a previous Seventh Circuit decision (*First National Bank of Chicago v. Material Service Corp.*, 597 F.2d 1110, 1121 (1979)), should be overturned. One event, in the court of appeals' view, justified it in discarding this line of precedent – this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

The court of appeals plainly erred in concluding that *Reliable Transfer* calls for overruling these cases. In fact, *Reliable Transfer* supports exactly the opposite result – it provides an additional reason for retaining the district courts' discretionary authority to deny prejudgment interest in cases of mutual fault.

Reliable Transfer overruled the divided damages rule, which required that total damages from a mutual fault collision be divided equally between the parties. The Court held instead that in collision cases in admiralty, damages are to be apportioned according to the relative fault of the parties. 421 U.S. at 411. This had long been the rule in personal injury cases in admiralty. See id. at 407, 409.

The court of appeals gave two reasons for concluding that under *Reliable Transfer* district courts may not deny prejudgment interest on the basis of mutual fault. First, the court said, the denial of prejudgment interest in mutual fault cases served to mitigate the often harsh effects of the equal division rule. Second, the court of appeals reasoned, *Reliable Transfer* reduced the uncertainty faced by the parties in a mutual fault case and thus

made an award of prejudgment interest more appropriate. Neither of these reasons bears scrutiny.

1. The court of appeals' first reason amounts to saying that the reason courts adopted the mutual fault principle in prejudgment interest cases was so that they could subvert the divided damages rule by manipulating the award of prejudgment interest. Indeed, the court of appeals reasoned that this was the *only* function served by the mutual fault rule in prejudgment interest cases, so that, according to the court of appeals, once the divided damages rule was overturned, "there no longer exists a reason" to allow the denial of prejudgment interest on this ground. Pet. App. 8a.

There are several difficulties with the court of appeals' reasoning. First, manipulating awards of prejudgment interest is too crude a way of compensating for the divided damages rule. Courts operating under the divided damages regime did develop principled and well-focused means of limiting the inequities of that rule. They developed the major-minor fault rule, under which the divided damages doctrine would not apply when one party was only minimally at fault. See *Reliable Transfer*, 421 U.S. at 406; G. Gilmore & C. Black, The Law of Admiralty 492-93 (2d ed. 1975). They also developed the *in extremis* rule, under which a vessel responding to an emergency not of its own creation would be excused from any resulting negligence. See Gilmore & Black at 491-92. But any court concerned about the inequity of the divided damages rule would be ill-advised to try to use awards of prejudgment interest as a corrective. The amount of prejudgment interest depends on interest rates and the duration of the litigation. Neither of these factors

bears any necessary relationship to any damages award. It would be entirely fortuitous if even the most unprincipled district judge were able to use a prejudgment interest award to "compensate for" the perceived inequities of the divided damages rule.

Second, the divided damages rule was, before *Reliable Transfer*, a rule that the lower courts were obligated to apply. The court of appeals' approach therefore attributes to the lower courts a degree of disingenuousness. Rather than forthrightly seeking to limit the divided damages rule, as through the major-minor fault doctrine or the *in extremis* rule, the lower courts – according to the court of appeals – invented a rule solely to enable themselves to award or deny prejudgment interest when, under the law then in effect, there was no legitimate reason to do so. Many lower court judges expressed intense disagreement with the divided damages rule (see *Reliable Transfer*, 421 U.S. at 404-05; Gilmore & Black at 530-31), but they then proceeded to apply the rule, not evade it. There are, to be sure, a few cases from the Second Circuit in which awards of prejudgment interest were viewed as a way to circumvent the divided damages rule. See *Iberian Tankers Co. v. Gates Construction Co.*, 504 F.2d 747, 748 (1974); *Afran Transport Co. v. The Bergechief*, 285 F.2d 119 (1960). But it is implausible to say that the *only* function served by this prejudgment interest principle was to undermine, in a crude and inefficient way, a principle that the judges were supposed to apply.

Finally, the court of appeals' account cannot be reconciled with the fact that even in personal injury cases – where comparative fault, not divided damages, has long been the rule in admiralty – courts have applied the

principle that prejudgment interest can be denied in mutual fault situations. See, *e.g.*, *Inland Oil and Transport Co.*, 696 F.2d at 328, citing *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1983), and *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1197 (5th Cir. 1982). This demonstrates that the mutual fault rule for determining when prejudgment interest would be awarded served purposes beyond the highly questionable one suggested by the court of appeals – purposes that it continues to serve after *Reliable Transfer*.

2. The court of appeals' second reason for concluding that *Reliable Transfer* warrants a change in prejudgment interest law is not only mistaken but amounts to an argument in favor of the mutual fault rule. The court of appeals acknowledged that "there are decisions stating that, at least where fault is mutual, prejudgment interest . . . should be denied due to the uncertainty as to which party will bear the ultimate liability to make payment to the other." Pet. App. 11a. The court of appeals went on to reject these decision on the following ground (id. at 11a-12a):

> [U]sing uncertainty as a basis to deny interest in a mutual fault case made sense under the old divided damages regime. This is because under that rule, it was not until after trial that there would be a determination from the district court as to which of the parties would have to come up with the extra money to make the other party whole. But now with the abolition of the divided damages rule and the adoption of comparative fault both parties are liable to each other in relation to their respective degree of fault. In other words, although the exact amount

> of damages may not be known until after trial, neither party can now claim pretrial uncertainty as to whether he will in fact be liable to the other. Thus, after *Reliable Transfer*, it only makes sense that uncertainty as to eventual liability can no longer be a factor to consider in determining whether to deny prejudgment interest in cases involving mutual fault.

This reasoning is precisely backward. *Reliable Transfer* increased the uncertainty faced by parties to litigation. Often in collision cases, as the court of appeals appears to recognize, the total amount of damage is easily ascertained, at least within a narrow range. That is because the damage is mostly to property, not to persons, and assessors can fix its value. Before *Reliable Transfer*, as soon as it became clear that both parties were significantly at fault, both knew, more or less exactly, the extent of their liability – each would be responsible for half of the damage.

Now, however, in a regime of comparative fault, the parties cannot know their liability until the end of the litigation, when the precise degrees of fault have been determined. The court of appeals appears to have recognized that uncertainty is a reason to mitigate or withhold prejudgment interest. It follows that *Reliable Transfer*, by increasing the degree of uncertainty, strengthens, rather than weakens, the case for allowing district courts to withhold prejudgment interest when there is mutual fault and a genuine dispute.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 94-788

In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

v.

CEMENT DIVISION NATIONAL GYPSUM COMPANY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

In a mutual fault, admiralty, collision case, is a party's fault a special or peculiar circumstance justifying the trial court's exercise of its discretion to deny recovery of prejudgment interest to that party?

LIST OF PARTIES

1. The List of Parties in Petitioner's Brief on the Merits is true and correct.

2. The following Respondents have parent corporations:

   a. Allstate Insurance Company is a wholly owned subsidiary of Sears, Roebuck and Co.

   b. Highlands Insurance Company is owned by Halliburton Company.

   c. Insurance Company of North America (U.K.) Ltd. "G" A/o is owned by CIGNA Corporation.

   d. Insurance Company of North America (U.K.) Ltd. "O" A/o is owned by CIGNA Corporation.

3. The balance of respondents are independent entities.

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STATEMENT OF THE CASE

Petitioner's Statement of the case is inaccurate or incomplete in several respects.

1. The settlement agreement between the parties, referred to in Petitioner's Statement (Pet. Brief 2), provided that the questions of whether prejudgment interest should be awarded, and, if so, the rate of interest would be submitted to the court for decision. (J.A. 46).

2. In its reversal, in addition to its decision concerning mutual fault, the Court of Appeals held that, "we refuse to recognize municipality status as a peculiar circumstance warranting the denial of prejudgment interest." (J.A. 13a). Petitioner has not appealed as to that holding.

SUMMARY OF THE ARGUMENT

A. The court prescribed rule in admiralty is that prejudgment interest is to be awarded, but discretion to deny prejudgment interest can be exercised where there are special or peculiar circumstances justifying its denial. The question presented in this case is quite simply whether a court can exercise discretion to deny prejudgment interest in a mutual fault, admiralty, collision case on the ground that the party seeking the prejudgment interest was at fault. A majority of lower courts hold that it cannot do so; a minority hold that it can do so.

B. The discretion to deny prejudgment interest is bounded by rules and principles of law, not the least of which is the precept that prejudgment interest is

designed to afford an injured party full and complete compensation. Prejudgment interest is compensation for the use (or the opportunity for use) of money from the date of injury/loss to the date of judgment. Discretion to deny prejudgment interest, because of the fault of the party seeking to be compensated for its loss, is patently inconsistent with the goal of fully compensating the party for its loss.

C. Since the adoption of the rule of true comparative negligence in admiralty in 1975, there is no longer any rationale for allowing discretion to deny prejudgment interest because of mutual fault. A rule permitting the exercise of such discretion would foster and encourage litigation because of uncertainty as to when and under what circumstances prejudgment interest would be denied.

D. Discretion to deny prejudgment interest in a mutual fault, admiralty, collision case creates an anomaly in a true comparative negligence regime. The rationale for awarding prejudgment interest is to achieve the goal of full compensation by converting time of accident damages (the amount of which is based upon the relative degree of fault of the parties) to time of judgment damages (that is, damages determined under true comparative negligence principles plus interest on *those* damages). Discretion to deny prejudgment interest, based solely on the mutual fault of the party seeking its recovery, would amount to a penalty.

E. Because the relative degree of the parties' fault prior to the accident is now determined under principles of true comparative negligence, a "bright line" rule

against denial of prejudgment interest is appropriate. An exception limited to instances where the party seeking interest has engaged in post-accident conduct (e.g., undue delay in prosecuting the action or assertion of frivolous claims), such that the interests of justice mandate a denial of prejudgment interest, would be consistent with this Court's prior decisions as well as decisions of a majority of lower courts addressing the issue, and would minimize litigation over prejudgment interest.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT, IN A MUTUAL FAULT, ADMIRALTY, COLLISION CASE, A DISTRICT COURT DOES NOT HAVE THE DISCRETION TO DENY PREJUDGMENT INTEREST BASED UPON THE FAULT OF THE PARTY SEEKING ITS RECOVERY.

A. Prejudgment interest is the rule in admiralty collision cases. A majority of lower courts have held that mutual fault of the parties is not a special or peculiar circumstance justifying the exercise of a court's discretion to deny prejudgment interest. The Fifth and Eleventh Circuits have held that mutual fault is such a peculiar circumstance. Which is correct is the question presented to this Court.

1. For nearly two centuries, this Court has recognized that in admiralty cases prejudgment interest is a necessary component of the measure of full compensation. *The Amiable Nancy*, 16 U.S. (3 Wheat) 546, 560 (1818); *The Anna Maria*, 15 U.S. (2 Wheat) 327, 335 (1817); *Del Col*

v. Arnold, 3 U.S. (3 Dall.) 333, 334 (1796); *The Umbria*, 166 U.S. 404, 421-22 (1897). It is well settled today that an award of prejudgment interest is the general rule in admiralty law. *See: Cement Division, National Gypsum Co. v. City of Milwaukee*, 31 F.3d 581, 583 (7th Cir. 1994) ("The general rule in admiralty, in order to fully compensate the plaintiff, is to award prejudgment interest from the date of the accident."); *Inland Oil and Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321, 327 (5th Cir. 1983) (quoting *Noritake Co. v. M/V HELLENIC CHAMPION*, 627 F.2d 724, 728 (5th Cir. 1980)); *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986); *Alkmeon Naviera, S.A. v. M/V MARINA L*, 633 F.2d 789, 797 (9th Cir. 1980); *Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 367-68 (6th Cir. 1986), *cert. denied*, 479 U.S. 849 (1986). This Court has long approved of prejudgment interest in mutual fault cases. *The Manitoba*, 122 U.S. 97 (1887). Notwithstanding this Court's holding in *The Manitoba* and the general rule, lower courts have carved out an exception to the rule which allows a district court to exercise discretion to deny prejudgment interest when there exist special or peculiar circumstances which make it inequitable for the losing party to pay prejudgment interest. *See: Cement Division*, 31 F.3d at 583; *Inland Oil*, 696 F.2d 327; *Parker Towing*, 794 F.2d at 594; *Alkmeon Naviera*, 633 F.2d at 797-98; *Oglebay Norton*, 788 F.2d at 368.

2. The Circuit Courts addressing the issue of what constitutes a special or peculiar circumstance are in general agreement that 1) unwarranted delay in filing the action on the part of the party seeking the interest, and 2) bad faith/frivolous claims do constitute special or peculiar circumstances which justify the exercise of a court's discretion *to deny* prejudgment interest. *Inland Oil*, 696

F.2d at 327-328; *Alkmeon Naviera*, 633 F.2d at 797-798; *Cement Division*, 31 F.3d at 583. Circuit courts in the Sixth, Seventh, and Ninth Circuits have explicitly held that mutual fault does not constitute a peculiar circumstance justifying the denial of prejudgment interest in an admiralty collision case. *Anderson v. Whittaker Corp.*, 894 F.2d 804, 810 (6th Cir. 1990) (holding that neither mutual fault nor mutual fault combined with uncertainty as to claims or damages are peculiar circumstances precluding an award of prejudgment interest); *Cement Division*, 31 F.3d at 585 (holding that mutual fault does not constitute a peculiar circumstance); *Alkmeon Naveria*, 633 F.3d at 789 and n. 12 (awarding interest where plaintiff was forty percent at fault because the record showed no peculiar circumstances justifying denial and specifically stating in a footnote that denial of prejudgment interest on mutual fault grounds would seem no longer necessary since the abrogation of divided damages and would penalize a party twice for the same mistake). Subsequent cases in the Ninth Circuit have adhered to the *Alkmeon Naviera* rule. *Stevens v. F/V BONNIE DOON*, 655 F.2d 206, 209-210 (9th Cir. 1981); *Western Pacific Fisheries v. S/S PRESIDENT GRANT*, 730 F.2d 1280, 1288 (9th Cir. 1984). While the Third Circuit has not considered the question of mutual fault as a special or peculiar circumstance, it has stated that, "[g]enerally, exceptional circumstances exist *only* when the district court concludes that the party requesting interest has (1) unreasonably delayed in prosecuting its claim, (2) made a bad faith estimate of its damages that precluded settlement, or (3) not sustained any actual damages." (emphasis added). *Matter of Bankers Trust*, 658 F.2d 103, 108 (3rd Cir. 1981), *cert. denied*, 456 U.S. 961

(1982). The court cited *Alkmeon Naviera*, 633 F.2d at 797-98, in support thereof. Likewise, the Eighth Circuit has stated that the *only causes* for denying prejudgment interest would be where a party "was dilatory in bringing suit or if the suit was frivolous." *United States v. Motor Vessel Gopher State*, 614 F.2d 1186, 1190 (8th Cir. 1980). District courts in other circuits specifically have held that mutual fault is not a special or peculiar circumstance so as to justify a denial of prejudgment interest. *Granholm v. TFL EXPRESS*, 576 F. Supp. 435, 456-457 (S.D.N.Y. 1983) (wherein party 50% at fault who suffered all of the damages was granted prejudgment interest); *Matter of Getty Marine*, 1983 A.M.C. 550, 552 (E.D. Va. 1982) (wherein a party 70% at fault was granted prejudgment interest on its net recovery); *STARLIGHT I, Inc. v. Patriots Corp.*, No. 83-3783-Z, slip op. at 7 (D.Mass. Aug. 9, 1985) (wherein a party 30% at fault was granted prejudgment interest in order to fully serve "the purpose of compensating an injured party" (at p. 7)); *Complaint of B.F.T. No. Two Corp.*, 433 F. Supp. 854, 876 (E.D. Penn. 1977) (comparative fault of parties held no longer a consideration in awarding prejudgment interest because of *Reliable Transfer* proportionate fault rule and claimant in limitation of liability action awarded prejudgment interest despite 75% fault); *Lone Star Industries v. Mays Towing Co. Inc.*, 725 F. Supp. 440, 445 (E.D. Mo. 1989), *rev'd on other grounds*, 927 F.2d 1453 (8th Cir. 1991) (wherein a party's 40% fault was considered not to be a circumstance to justify the denial of prejudgment interest).

Only the Fifth and Eleventh Circuits, and district courts therein, have held that mutual fault constitutes a peculiar circumstance justifying the exercise of discretion to deny prejudgment interest. Prior to 1983, the Fifth

Circuit had approved of some awards of prejudgment interest in mutual fault settings. *See, e.g., National Marine Service, Inc. v. Talley,* 348 F.2d 589 (5th Cir. 1965), *Sinclair Refining Company v. SS GREEN ISLAND,* 426 F.2d 260 (5th Cir. 1970). It had also approved denials of prejudgment interest in some cases involving so-called genuine disputes over good faith claims in mutual fault settings. *See, Nat G. Harrison Overseas Corp. v. American Tug TITAN,* 516 F.2d 89, 97 (5th Cir. 1975), and cases cited therein. In 1983, the Fifth Circuit held that it had "consistently upheld denials of prejudgment interest in cases of apportioned fault." *Inland Oil,* 696 F.2d at 328. With respect to the "good faith or genuine dispute regarding liability" component, the *Inland Oil* court appears to have equated a good faith dispute to a finding of any degree of mutual fault because the court declined to define a dividing line in apportionment for upholding a denial of prejudgment interest on the ground of mutual fault as a peculiar circumstance. However, any focus on good faith dispute is totally inappropriate since Rule 11 of the Federal Rules of Civil Procedure should guarantee that every dispute will be a genuine dispute over a good faith claim by mandating that the attorney who signs a pleading certifies that: the pleading is not being presented for any improper purpose; the claims, defenses and contentions therein are warranted; the allegations and factual contentions have or are likely to have evidentiary support; denials are warranted or reasonably based on a lack of information or belief. 28 U.S.C.A. Rule 11(b) (1994). In *Inland Oil* the argument was made that "because a 'serious dispute' occurs any time there is a trial on the merits, this cannot be a justification for denying prejudgment interest." *Inland Oil,* 696 F.2d at 328. The Fifth

Circuit's response was that "a finding that a plaintiff was partially at fault weakens his equitable claim that his funds have been withheld by a recalcitrant party." *Id.* That response is really a nonsequitur, since a finding that a plaintiff is partially at fault lessens the amount of *damages* to which that party is entitled under comparative negligence principles. It should have no bearing on the interest *on those damages* to which the plaintiff is entitled under well established principles requiring full and complete compensation. The Eleventh Circuit, which once was a part of and generally follows the Fifth Circuit, has also held that the existence of a genuine dispute regarding liability is one peculiar circumstance which may warrant denial of prejudgment interest, *Parker Towing Co.*, 794 F.2d at 594, and that the existence of such a peculiar circumstance is generally assumed in cases of apportioned fault. *Id.*, citing *Inland Oil*, 696 F.2d at 328. In its consideration of prejudgment interest, that court neither considered nor cited any case outside of Fifth Circuit decisions.

In the instant case, the actual holding of the United States Court of Appeals for the Seventh Circuit, from which Petitioner brought its Petition and upon which this Court granted Certiorari, states as follows:

> ". . . . , as a matter of law, the mutual fault of the parties should not constitute a reason to deny an award of prejudgment interest in admiralty."

Cement Division, 31 F.3d at 585, Pet. for Cert. at 9a. The Court also reiterated its ruling as follows:

> ". . . . mutual fault of the parties in an admiralty collision case does not constitute a peculiar circumstance justifying the denial of prejudgment interest."

Cement Division, 31 F.3d at 586, Pet. for Cert. at 13a. It is noteworthy that the latter statement was footnoted as follows:

> "This opinion was circulated before release to all judges in active service. *See* Circuit Rule 40(f). No judge favored a hearing *en banc*."

Cement Division, 31 F.3d at 586, Pet. for Cert. at 13a. The question for consideration by this Court is whether, in a mutual fault, admiralty collision case, a Court can exercise discretion to deny prejudgment interest to a party seeking its recovery because of that party's pre-accident/loss fault.

B. Discretion to deny prejudgment interest because of mutual fault is inconsistent with the general policy underlying civil litigation to fully compensate an injured party.

1. It is now a well established precept of civil law that prejudgment interest is designed to afford an injured party, generally the plaintiff, full and complete compensation from the day of the injury to the day of judgment. *See: Prejudgment Interest: Survey and Suggestions*, 77 Nw. U.L. Rev. 192 (1982) (hereinafter, *"Survey and Suggestions"*); 1 D. Dobbs, Law of Remedies, § 3.6(1) (1993). This Court has consistently recognized that prejudgment interest is an element of damages and is necessary to fully compensate the injured party (plaintiff). *Funkhouser v. J. B. Preston Co. Inc.*, 290 U.S. 163, 168 (1933); *Royal Indemnity Co. v. United States*, 313 U.S. 289, 295-97 (1941); *Miller v. Robertson*, 266 U.S. 243, 257-58 (1924). Implicit in the aim of achieving full compensation is that a party not

only recover the full measure of damages due as a result of the accident, but also that the party be compensated for the use of its damage recovery from the date of the accident:

> Compensation is a fundamental principle of damages whether the action is in contract or in tort. . . . One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. . . . Generally, interest is not allowed upon unliquidated damages. . . . [b]ut when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages. . . . (citations omitted)

Miller, 266 U.S. at 257-58.

2. This Court in *Miller* and other cases has held that when necessary to arrive at a fair compensation, the court may include interest. In so doing, this Court recognized the general principle that interest is necessary to place the injured or damaged party in the same position as it would have been were it not for the accident. A denial of prejudgment interest makes that party an involuntary creditor, without recourse, of the party owing interest because the latter had use of the former's money which actually was due from the time of the accident. Cf., *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir. 1992). It is counter-intuitive to hold on the one hand that a party is entitled to be fully compensated for its loss, but on the other hand that mutual fault justifies a denial of prejudgment interest. To the extent that the Petitioner

argues the latter point, its position is patently inconsistent with the principles of compensation underlying civil law developed by this Court.

3. The Petitioner, at pages 19-24 of its Brief on the Merits (hereinafter, "Pet. Brief"), raises several points which merit discussion in the context of the Respondents' right to complete compensation. Specifically, Petitioner argues that its liability for prejudgment interest stems from its "justified refusal" to settle the litigation during the first decade of its existence because it appeared that Petitioner would have no liability, and that an award of prejudgment interest in this context essentially penalizes a defendant (or any party) for continuing to litigate a matter.[1] Contrary to the emphasis placed by the Petitioner (and defendant in this case) on the defendant's perspective, the cases and other authorities cited in its Brief on the Merits explicitly recognize that prejudgment interest is an element of complete compensation due the *plaintiff. See: West Virginia v. United States*, 479 U.S. 305,

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[1] Despite the fact that the Petitioner has chosen not to appeal the appellate court's determination that status as a municipality is not a peculiar circumstance justifying the denial of prejudgment interest, the Petitioner nonetheless continues to argue the issue to this court. Two points merit mention regarding this component of the Petitioner's argument. First, the Petitioner, by operating the Port of Milwaukee in which the accident took place as a proprietary enterprise, *Bagrowski v. American Export Isbrandtsen Lines*, 440 F.2d 502, 509 (7th Cir. 1971), is "assumed to have accepted the ordinary incidents of suits in such business," including the obligation to pay interest to the same degree as any private concern. *Standard Oil Co. v. United States*, 267 U.S. 76, 79 (1925). Second, like any other business, the Petitioner could have (and should have) procured insurance. It chose not to do so.

310 n. 2 (1987); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) ("we have repeatedly stated that prejudgment interest 'is an element of [plaintiff's] complete compensation.' "), citing *West Virginia*, 479 U.S. at 310 and n. 2 and *General Motors Corp. v. DeVex Corp.*, 461 U.S. 648, 655-656, and n. 10 (1983); *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 335 (1988) ("Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered.", citing *West Virginia*, 479 U.S. at 310 and 310-311, n. 2).

West Virginia made clear that this Court proceeds from the well-established principle that prejudgment interest is an element of complete compensation, not designed to punish a party, but to make the party whole. *West Virginia*, 479 U.S. at 310 and n. 2. Clearly, the focus is on the plaintiff's interest in complete compensation, not – as argued by the Petitioner at pp. 19-23 of its Brief – on the defendant's perspective that prejudgment interest operates as a cost imposed on the defendant for litigating its claim, discourages the defendant from settling, etc. As a matter of fact, one authority cited by Petitioner speaks eloquently to the correct perspective from which prejudgment interest awards are to be assessed. The discussion of this perspective arises in the context of the historical reluctance of courts to award prejudgment interest on unliquidated damages:

> "The rationale underlying the distinction between liquidated or reasonably ascertainable damages and unliquidated damages is that the defendant should not have to pay interest when he is unable to halt the accrual of interest by

> paying the damages – damages which, if unliquidated, cannot be determined prior to judgment. The distinction makes the *defendant's* point of view crucial: as long as the defendant cannot determine the extent of damages, no interest is awarded.
>
> "This emphasis on the defendant's perspective is misplaced. Interest is necessary to achieve full compensation even without such wrongdoing on the defendant's part as would make him liable for punitive damages. *Since interest is compensatory, the perspective of the plaintiff should determine the propriety of an interest award.* If the goal of civil litigation is, indeed, to provide full compensation to the plaintiff, then the defendant's uncertainty as to the amount of his liability should be irrelevant."

Survey and Suggestions, 77 Nw. U.L. Rev. at pp. 197-98. (emphasis added)

The Petitioner attempts to diminish the importance of the shift in this Court's focus from a balancing of the equities approach (which arguably considers the perspective of the defendant) to the rule in *West Virginia* that prejudgment interest is an element of plaintiff's complete compensation. *See,* Pet. Brief, p. 14 at n. 5. Petitioner states that this Court's rejection of the "balancing of the equities" approach in *West Virginia* leaves intact the "equitable and discretionary nature of prejudgment interest" as demonstrated by the Court's dicta that " 'an equitable consideration such as laches' might bar 'an otherwise valid claim' for prejudgment interest." *Id.*

Petitioner misstates the Court's holding. *West Virginia* explicitly recognized the principle of prejudgment interest as an element of complete compensation, i.e., as an element of damages. That recognition does not alter a court's ability to deny prejudgment interest on the basis of post-accident action or inaction of the plaintiff, such as unreasonable delay in pursuing its rights or assertion of frivolous claims (*see* discussion *infra*). Petitioner's focus on the defendant's perspective (which is implicit in its arguments that an award of prejudgment interest is inappropriate when the defendant believes that it does not have liability and that an award of prejudgment interest penalizes a defendant for continuing to litigate) is simply a veiled attempt to return to the balancing of equities approach which this court specifically rejected in *West Virginia*. Petitioner should not be allowed to revisit that issue here.

In addition, a number of cases cited by Petitioner in its Brief recognize that the underlying purpose of prejudgment interest is to compensate the plaintiff for the use of its money between the time when the damages were incurred and the time of judgment. For example, in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), this court addressed the rule of the United States Government's traditional immunity from interest in the context of an award of an attorney fee which included an increase in the lodestar to compensate for a delay in payment of the fee. Holding that such an award of increased compensation really constituted an award of interest prohibited by the "no-interest rule", this Court recognized that the function of interest is to compensate the plaintiff for the

loss of the opportunity to use the funds which constitute damages:

> Respondent claims, however, that interest and delay represent more than mere semantic variations. Interest and a delay factor, according to the respondent, have distinct purposes: the former compensates for loss in the use of money, while the latter compensates for loss in the value of money.
>
> We are not persuaded. Interest and the delay factor share an identical function. *They are designed to compensate for the belated receipt of money.* (emphasis added)

Id. at 322. In discussing how interest is computed, this Court further noted that "[a]n interest rate reflects not only the real opportunity cost of capital, but also the inflation rate. Thus, loss of value due to delay is an element of an interest adjustment." (citation omitted) *Id.* at n. 7. Earlier, in *Funkhouser*, 290 U.S. at 168, this Court recognized the concept that interest is designed to compensate for the time value of money: "the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of the breach [of contract] and nothing is added for the delay in obtaining the award of damages."

The discretion of a trial court is not unbridled but is to be exercised under law. *Amoco Cadiz*, 954 F.2d at 1334. "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975), quoting from *United States v.*

Burr, 25 F. Cas. 30, 35 (No. 14, 692d) (CC Va. 1807) (Marshall, C.J.); *Amoco Cadiz*, 954 F.2d at 1334. Exercise of discretion to deny prejudgment interest in a mutual fault setting, by itself, is inconsistent with the recognized principles that 1) the plaintiff (recovering party) is entitled to be fully compensated, and 2) an award of prejudgment interest compensates the plaintiff (recovering party) for the use of its money between the date of the accident/loss and the date of judgment. When viewed in the context of admiralty law and a comparative fault regime, the exercise of discretion to deny prejudgment interest, based on the mutual (or even greater) fault of the party or parties seeking recovery of interest, is illogical.

C. Since the adoption of the rule of true comparative negligence, a rule in admiralty permitting denial of prejudgment interest because of mutual fault has no rational basis and would promote litigation because of uncertainty.

Petitioner argues that this Court's decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), adopting true comparative negligence in collision cases to replace the long standing rule of divided damages, supports the minority rule that discretion to deny prejudgment interest may be exercised when there is a good faith dispute in a mutual fault setting. The central component of Petitioner's argument on this point appears to be that under the divided damages rule there was certainty as to the amount of damages a defendant would owe, because parties simply added up the damages and divided them by the number of parties at fault, but that under *Reliable Transfer*, by contrast, there is uncertainty as to the amount

of damages a defendant may owe in a comparative negligence regime because its comparative fault cannot be assessed until a trial. Therefore, Petitioner argues, it is unfair to award prejudgment interest when a defendant has chosen to pursue the litigation in order to ascertain that certainty in the form of an allocation of fault.

This central component of Petitioner's argument smacks of the policy underpinnings for courts' historical reluctance to award prejudgment interest upon unliquidated damages. *See, Funkhouser,* 290 U.S. at 168 ("the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages.") As discussed *supra,* an approach allowing courts to deny prejudgment interest under these circumstances wholly disregards the axiomatic principle that the plaintiff as the injured or damaged party is entitled to be fully compensated. More to the point, this Court decided to abolish the divided damages rule because the rule that the damages of parties to a collision were to be added up and divided equally between those at fault 1) was arbitrary if there was a way to determine the actual proportionate fault of the parties, and 2) did not tend to induce care and vigilance on the part of ships (the policy articulated for maintaining the divided damages rule) any more than did a comparative negligence regime. With respect to the arbitrariness, it is clear that before *Reliable Transfer,* while there may have been greater certainty (if multiple parties admitted to fault) as to the result, that is, the exact measure of the amounts which the parties

would owe, there was little or no certainty as to the *correctness* of that result.

The replacement of the divided damages rule with true comparative negligence, because the former was patently unjust, amounted to a recognition that a party's actual comparative liability, where such liability can be determined, should control the apportionment of damages. This is in sharp contrast to an arbitrary policy of adding damages and dividing them equally between the parties at fault, no matter what the degree of fault. Since *Reliable Transfer*, once the result is finally determined by the trial court, or an appellate court, there is absolute certainty, based upon a comparative, pro rata percentage, as to the correctness of the result. Then it is fair and just to assess prejudgment interest on the *share of damages attributable to each party based on its proportionate fault*, as opposed to basing the assessment of prejudgment interest on an amount arbitrarily determined under the divided damages rule. For this reason, Petitioner's claim that comparative negligence principles increase the amount of uncertainty, which in turn justifies a denial of prejudgment interest in a mutual fault setting, is an anomaly. Comparative negligence ensures that each party will pay prejudgment interest only on the other's true measure of damages and will receive prejudgment interest only on its own true measure of damages. Each party is fully compensated for its loss. No party sustains a windfall. While the minority rule followed by the Fifth and Eleventh Circuits may have had justification in the divided damages regime, because the courts unilaterally believed that

divided damages was an arbitrary measure of damages,[2] such a rule has no place in post-*Reliable Transfer* admiralty law and should be eliminated for the same reasons that the divided damages rule was eliminated.

The approach advocated here by Respondents would promote settlements and reduce litigation over prejudgment interest. This Court has already determined that the rule of fairness achieved by true comparative negligence does not appear to discourage the negotiation of settlements in Jones Act personal injury cases. *See Reliable Transfer*, 421 U.S. at 408, n. 13. By the same rationale, it is plausible that a rule prohibiting a court from the exercise of discretion to deny prejudgment interest in mutual fault settings (except where the plaintiff engages in post-accident, inequitable conduct justifying such a denial, discussed *infra*) would serve to encourage settlements and reduce litigation over prejudgment interest.

For example, let us assume that it is claimed that there was mutual fault in a given collision case. If the rule

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[2] Petitioner's assertion that "any court concerned about the inequity of the divided damages rule would be ill-advised to try to use awards of prejudgment interest as a corrective [sic] measure" (Pet. Brief at 29) does not alter the fact that courts were in fact uncomfortable with the arbitrariness of the divided damages rule. Petitioner concedes that such is the origin of the major-minor fault and in-extremis rules, and could well have been the origin of the disinclination of courts to award interest on what they deemed to be an arbitrary, harsh and incorrect measure of damages. It does not follow from the proposition of such action being "ill-advised" that it was not in fact done, and with good justification. *See: Afran Transport Co. v. The Bergechief*, 285 F.2d 119, 120 (2d Cir. 1960); *Iberian Tankers Company v. Gates Construction Corp.*, 504 F.2d 747, 748 (2d Cir. 1974).

were that in all cases of mutual fault a damaged party is entitled to prejudgment interest on his proportionate share of the damages, and if one party who is alleged to be partially at fault for the accident were to settle the case before a trial on the merits, that party actually would be rewarded for settling the case in that he would not be faced with the obligation to compensate the other party for the use of its money from the date of the accident (unless, of course, the parties agreed otherwise), since the matter would not be brought to trial. Where there is a compromise, no party has had the use of the money of another party for the entire period between accident and judgment, or all have considered it and taken it into account when negotiating the compromise settlement.

Put differently, discretion to deny prejudgment interest gives a party in a mutual fault case the incentive *not* to settle. Either party, but particularly the least damaged party, knowing that there may be a finding of mutual fault by the court once there is a trial, can refuse to settle and instead "roll the dice" as to whether the court will later exercise its discretion and deny prejudgment interest. If the trial court does not deny prejudgment interest on the amount of damages ultimately due one party, the paying party is none the worse off for refusing to settle because it has the money (or does not have to pay it) during the intervening time. If the court does decide to deny prejudgment interest, the paying party's gamble "pays off." In this respect, adoption of the discretionary standard advocated by the Petitioner, in the language of this Court, "would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a

virtually inevitable appeal." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 1995 WL 68408, 11 (U.S.) (February 22, 1995). Elimination of the discretionary standard in favor of a "bright line" rule which provides for prejudgment interest in cases where there is mutual fault, except for instances of narrowly defined, post-accident, inequitable conduct on the part of the party seeking recovery of prejudgment interest (discussed *infra*), would reduce protracted litigation and would promote settlements.

Petitioner argues that cases involving prejudgment interest on federal claims are a "reliable guide" as to how prejudgment interest should be treated in admiralty, specifically that the discretion to award prejudgment interest should rest in the trial court. (Pet. Brief at 9-10). The cases relied on by the Petitioner in this context are distinguishable for several reasons. First, as discussed *supra*, in admiralty prejudgment interest is the rule, and the discretion is not a *discretion to award* prejudgment interest but rather a *discretion to deny* prejudgment interest where special or peculiar circumstances exist which justify the denial. Admiralty recognizes a standard of presumption in favor of awarding prejudgment interest. The non-admiralty cases cited by Petitioner are distinguishable because the focus upon *discretion to award* prejudgment interest is completely different.

Second, many of the cases, cited by Petitioner as authority for the *discretion to award* prejudgment interest, do not involve a decision to award prejudgment interest in a mutual fault setting, but rather contain dicta which Petitioner takes out of context as support for its argument. For example, *Board of Comm'rs of Jackson County v.*

United States, 308 U.S. 343, 352 (1939), was quoted by Petitioner (Pet. Brief 10-11) as follows:

> "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."

Board of Commissioners involved an action brought by the United States on behalf of an Indian ward against the Board of Commissioners of Jackson County, Kansas, to recover back taxes collected by the county on lands which had been patented to the ward under a treaty. At issue was the recovery of interest in inter-governmental litigation. This Court ultimately concluded that interest could not be collected. The passage quoted by the Petitioner was written 55 years ago in the context of an issue as to interest in governmental actions based upon quasi-contractual obligations, not in a mutual fault collision case in admiralty.

Similarly, *Monessen Southwestern Railway Company v. Morgan*, 486 U.S. 330, 339 n. 8 (1988), is cited by the Petitioner as authority for the proposition that the decision of Congress not to enact a prejudgment interest provision in the Federal Employees' Liability Act (FELA) should be taken as an endorsement of a judge-made regime, with heavy emphasis on equitable discretion. Petitioner also relies on the absence of any prejudgment interest provision in the 1982 amendment to the federal post-judgment interest statute, 28 U.S.C.A. 1961 (1994), for the same argument. (Pet. Brief at 15-16). Petitioner's reliance on *Monessen* and the federal post-judgment interest statute reads far too much into the minds of Congress.

Moreover, *Monessen* involved the issue of whether state courts may award prejudgment interest in FELA actions pursuant to local practice. This court held that states may not so award prejudgment interest because federal law does not authorize awards of prejudgment interest in FELA actions and because, when enacting FELA, while Congress expressly dispensed with other common law doctrines of that era, Congress gave no express indication that it intended to abrogate the common law doctrine barring prejudgment interest. *Monessen* deals with state court practices and is distinguishable in interpreting federal law. It is wholly irrelevant to the question presented. By the same token, the federal post-judgment interest statute deals with just that and nothing more. Absent legislative statutory enactment, prejudgment interest is determined by judicial law, which differs substantially from judicial discretion.

D. Discretion to deny prejudgment interest based on the fault of a party (irrespective of degree) amounts to a penalty under a comparative negligence regime because the fault of the party has already been assessed at the comparative negligence stage.

Carried to its logical conclusion, Petitioner's argument, that a genuine dispute over liability in a mutual fault collision case justifies an exercise of discretion to deny prejudgment interest, amounts to a penalty being levied against the party seeking interest. The policy basis for the rule that prejudgment interest is to be awarded, absent special or peculiar circumstances justifying a denial, is that a victim deserves to be fully compensated

and prejudgment interest is a component of that compensation without which one party retains the time value of another party's money. When there is mutual fault, principles of comparative negligence operate to assure that both victims are compensated and penalized in accordance with their relative degree of fault, because each party is a plaintiff to the extent that he has been wronged by the other. Even if one party was more at fault than the other party, that party may only recover in proportion to the degree of wrong inflicted on it by the party which was less at fault. Therefore, it matters not what was the relative fault of the parties, since both are entitled to compensation to the extent of the other's liability. There is no loss or gain to either party, regardless of how much more at fault one party is in relation to the other.[3]

To deny an award prejudgment interest to either party, in such a case, amounts to a penalty, usually upon the party who sustains the greater damages – a factor wholly external to the degree of fault of the party – allowing the party who sustains less damages to obtain a windfall. Such an arbitrary result is precisely the type of "rough justice" this Court sought to eliminate by abrogation of the divided damages rule in *Reliable Transfer, supra*. As such, mutual fault or degree of fault are invalid reasons to deny prejudgment interest because the fault of the parties in causing the collision has already been taken

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[3] Whether prejudgment interest is assessed upon each party's proportionate recovery and they are offset to achieve a net recovery by one of the parties, or the recoveries are offset and prejudgment interest is assessed upon the resulting balance in favor of one of the parties, the net result in recovery of dollars and cents is the same.

into account in the assessment of liability and allocation of damages. It is reflected in their respective compensation. As succinctly stated by the United States Court of Appeals for the Seventh Circuit, "what is the point of computing the principal amount of damages in intricate detail if the judge may turn around and increase (or reduce) the value of that award . . . on the basis of vague equitable concerns?" *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1334.

E. Because the relative degree of the parties' causal fault is now determined under principles of true comparative negligence, a "bright line" rule against denial of prejudgment interest, with an exception limited to where the party seeking interest has engaged in post-accident conduct justifying a denial of prejudgment interest, would be consistent with this Court's prior decisions and decisions of a majority of lower courts addressing the issue.

A trial court's discretion to deny prejudgment interest should be limited to situations involving inequities arising by reason of actions (or failure to act, as the case may be) *after* the accident/loss by a party seeking prejudgment interest. Clearly, under a comparative negligence regime, everything pre-accident should have been considered in the assessment and allocation of fault in reaching the correct and certain measure of liability and damages. A clear example of such post-accident inequity is laches – recognized by this Court in *West Virginia* as an "equitable consideration" which might bar "an otherwise valid claim for interest." *West Virginia*, 479 U.S. at 311, n. 3.

What is important is the distinction between events which occur prior to the time of the accident/loss when damages are incurred and events which occur after that point to the date of judgment, as those events relate to the issue of the fairness in awarding prejudgment interest. To the extent that the inequitable conduct of a party bears directly on the concept that the party had the use of the other party's money, such as where a party unreasonably delays in bringing the action or obstructs or delays justice by asserting frivolous claims, it is logical and equitable to conclude that the party's own post-accident action or inaction "weakens his equitable claim that his funds have been withheld by a recalcitrant party." *Inland Oil*, 696 F.2d at 328. To allow a court to intermingle the fault of a party in contributing to the cause of the accident (which impacts the measure of liability and consequential damages) with the fault of that same party in taking or failing to take some post-accident action (which impacts his equitable claim that his funds have been withheld by the other party) would effectively alter, reduce or, in some instances, nullify application of comparative fault principles. The only legitimate exercise of a court's discretion to deny prejudgment interest is when a party engages in some post-accident conduct (such as delay in filing suit or including a frivolous claim along with a valid claim) which makes it inequitable to allow him to recover his prejudgment interest because that party is solely responsible for the post-accident, inequitable action and any consequences resulting from it such as delay in the dispute resolution.

Based upon the foregoing, a "bright line" rule against the denial of prejudgment interest in a mutual fault,

admiralty collision case would be appropriate. An exception to such a rule limited to where the party seeking prejudgment interest has engaged in post-accident/loss conduct (i.e., undue delay, assertion of frivolous claims or taking frivolous actions), such that the interests of justice justify a denial of prejudgment interest, would be consistent with this Court's prior decisions as well as the decisions of the majority of lower courts addressing the issue. It would most certainly hold litigation over prejudgment interest to a minimum.

CONCLUSION

The Judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

Petitioner,

vs.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

1. Respondents' central contention appears to be that prejudgment interest must be awarded or plaintiffs will not be fully compensated. E.g., Resp. Br. 1-2, 9-12. But if this were the only principle governing awards of prejudgment interest, the Court's repeated references to the discretionary character of prejudgment interest would be inexplicable. We detail those references in our opening brief. Pet. Br. 8-14. We also show that Congress made a decision to leave this discretionary regime intact. Id. at 15-16.[1] Prejudgment interest has never been viewed – by the common law, in admiralty, by this Court in construing federal statutes, or by Congress – as simply a matter of

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[1] Not only did Congress determine not to upset this discretionary regime, but even the proposed legislative reform, which was premised on the compensation of plaintiffs (see S. Rep. No. 97-275, 97th Cong., 1st Sess. 11 (1981)), was nonetheless fully consistent with what the district court did in this case. See S. 1700, § 302, 97th Cong., 1st Sess. (1981) at 68, adding 28 U.S.C. 1961 (b)(1):

> [T]he court may add [prejudgment interest] . . . where the facts of the controversy and the manner in which the case was litigated indicate that an award of such prejudgment interest is appropriate. . . . [I]nterest shall be . . . measured from the time that the party against whom damages have been awarded became aware of his potential liability or from the time that he should have become aware but, in any case, not to exceed a period of five years.

As we noted in our opening brief (at 16), the accompanying committee report stated that awards of prejudgment interest "would be left to the discretion of the district judge in each case." S. Rep. No. 97-275 at 12.

mechanically ensuring that plaintiffs receive the judgment in present-day dollars.

The discretionary nature of prejudgment interest cannot be understood unless one recognizes that an award of prejudgment interest imposes a burden on the defendant for its decision to continue contesting the litigation. See Pet. Br. 19-26. That is why mutual fault can justify withholding prejudgment interest: when the plaintiff is at fault, the trial court may be justified in concluding that the defendant acted reasonably in contesting the litigation, and therefore should not be burdened with an award of prejudgment interest. See id. at 22-24.

Respondents never address this justification for withholding prejudgment interest, which is a central argument in our opening brief. Instead, respondents, like the court of appeals, appear to believe that the only possible justification for denying prejudgment interest in a case of mutual fault was the desire to mitigate the harshness of the now-defunct divided damages rule. See Resp. Br. 16-22. This simply ignores the other justifications we advanced. In any event, as we explain in our opening brief, it is not plausible to suppose that subverting the divided damages rule was ever the principal justification for this approach to prejudgment interest. See Pet. Br. 27-32.

2. In this connection, respondents now appear to concede that the court of appeals was, as we maintained in our opening brief, in error on a central aspect of its reasoning. We showed in our opening brief that – directly contrary to the court of appeals – the overturning of the divided damages rule, in *United States v. Reliable Transfer*

Co., 421 U.S. 397 (1975), *increased* the uncertainty that the parties to an admiralty collision case faced and thereby made it *more* important for trial courts to have discretion to withhold prejudgment interest in mutual fault cases. Pet. Br. 31-32.[2] Respondents now admit this point. Resp. Br. 17-18 ("[B]efore *Reliable Transfer* . . . there may have been greater certainty . . . as to the result, that is, the exact measure of the amounts which the parties would owe").

Respondents seek to salvage their position by asserting that *Reliable Transfer* increased the "certainty" that the outcome of a collision case would be correct, in the sense of apportioning damages according to the parties' fault. See Resp. Br. 18 ("Since *Reliable Transfer* . . . there is absolute certainty, based upon a comparative, pro rata percentage, as to the correctness of the result."). But this point goes only to the soundness of the decision in *Reliable Transfer*, which of course we have never questioned. It has nothing to do with the uncertainty the parties face in predicting their liability and entering into rational settlements. That uncertainty, which respondents now agree was only increased by *Reliable Transfer*, is the issue that bears on the appropriateness of awarding prejudgment interest.

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[2] That is because, under the divided damages regime, once it became clear that both parties to a collision were at fault, each party knew the exact extent of its liability. (This assumes that the total damages were fixed by assessment or otherwise, as they often were, at least within a reasonably narrow range.) Now, the degree of each party's fault – often a highly controversial matter, as this case shows – must be litigated.

3. Respondents' account of the relevant precedents warrants correction in at least two respects.

a. Respondents state that "[t]his Court has long approved of prejudgment interest in mutual fault cases" (citing *The Manitoba*, 128 U.S. 97 (1887)) and that the "lower courts have carved out an exception" that allows trial judges discretion to withhold prejudgment interest. Resp. Br. 4. The fact that the Court did not take issue with the lower courts' decision to award prejudgment interest in *The Manitoba* (a case that, in any event, is not about prejudgment interest) of course says nothing about when district courts may exercise their discretion to deny prejudgment interest. And contrary to respondents' contention, the discretion to deny prejudgment interest in admiralty is not the creation of "lower courts": it was stated in broad and emphatic terms by this Court, in opinions by Justices Field and Bradley. *The Maggie J. Smith*, 123 U.S. 349, 356 (1887); *The Scotland*, 118 U.S. 507, 518-19 (1886). See Pet. Br. 8-9.

b. Like the court of appeals, respondents insist (Br. 5) that the Ninth Circuit's opinion in *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 789 (1980), supports the court of appeals' decision in this case. This is a misreading of *Alkmeon Naviera*. See Pet. Br. 18 n.7. The Ninth Circuit in *Alkmeon Naviera* carefully and explicitly left the door open for a district court to do exactly what the district court did in this case: to make "a specific finding" (633 F.2d at 798) denying prejudgment interest in a case of mutual fault in which there is a good faith dispute over whether the defendant will be liable at all.

In *Alkmeon Naviera*, unlike this case, both parties admitted a significant degree of fault – a fact that the Ninth Circuit emphasized (see 633 F.2d at 798) – and there was, as a result, virtually no possibility that the defendant would escape liability. See id. at 792, 796. By contrast, in this case the City had every reason to believe that it would escape significant liability throughout the first decade of the litigation. Moreover, in *Alkmeon Naviera*, the defendant was more responsible than the plaintiff (id. at 792, 796); here, the City was at first virtually exonerated, and ultimately assigned only one-third of the fault. *Alkmeon Naviera*, therefore, was not a case in which a less guilty defendant was required to pay prejudgment interest to a more guilty plaintiff.

Finally, the district court in *Alkmeon Naviera* had given no explanation for its action (633 F.2d at 797), and the Ninth Circuit accordingly remanded to give it an opportunity to make a specific determination, if appropriate (id. at 798). By contrast, the district court here explicitly relied on the rule that prejudgment interest may be denied when there is mutual fault and a good faith dispute over liability. Pet App. 21a. At most, therefore, *Alkmeon Naviera* must be read to leave open the question at issue here.

4. Respondents propose (Br. 27) a rule under which prejudgment interest could be denied only on the basis of the plaintiff's "post-accident" conduct, such as the conduct of the litigation. This Court's decisions on prejudgment interest in admiralty do not hint at any such limitation; and in other areas the Court has, on several occasions, referred to broad equitable considerations of a kind that would justify denying prejudgment interest

solely on the ground that the plaintiff was more responsible for the loss than the defendant was. See, *e.g.*, *Blau v. Lehman*, 368 U.S. 403, 414 (1962) ("inequitable"); *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 352 (1939) (same); *Rodgers v. United States*, 332 U.S. 371, 373 (1947) ("relative equities" of the parties); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989) ("fundamental considerations of fairness").

But even under respondents' proposed rule, the district court's exercise of discretion should be sustained. The significance of mutual fault is, in large measure, that it creates a possibility that the defendant will not be held liable. That in turn may warrant the district court in finding that the defendant's decision not to settle on the terms offered by the plaintiff was reasonable and should not be burdened by an award of prejudgment interest. Decisions about settlement are, obviously, "post-accident" events. Since a principal function of the finding of mutual fault is to shed light on the reasonableness of those decisions, the court of appeals erred even under respondents' proposal that the prejudgment interest inquiry be confined to "post-accident" events.

CONCLUSION

For these reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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